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REPORTS

1855
July 31

OF

CASES AT COMMON LAW AND IN EQUITY, *s*

DECIDED IN

THE COURT OF APPEALS

OF KENTUCKY.

BY BEN. MONROE,

REPORTER OF THE DECISIONS OF THE COURT OF APPEALS.

VOL. XVI.

CONTAINING THE CASES DECIDED AT THE SUMMER AND WINTER TERMS, 1855.

FRANKFORT, KENTUCKY.
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Rec. Mar. 30, 1856.

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JUDGES OF THE COURT OF APPEALS.

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HON. B. MILLS CRENSHAW, }
HON. JAMES SIMPSON, } JUDGES.
HON. HENRY J. STITES, }

JUDGES OF THE CIRCUIT COURTS IN KENTUCKY,

With the No. of District, and Residence.

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HON. C. D. BRADLEY, Second District. Residence, Trigg county.
HON. JESSE W. KINCHELOE, Third District. Residence, Breckinridge county.
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HON. HENRY PIRTLE, Chancellor of the Louisville Chancery Court. Residence,
Louisville.

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DECISIONS
OF
THE COURT OF APPEALS
OF KENTUCKY.

SUMMER TERM, 1855.

Commonwealth vs. Harvey.

MOTION.

APPEAL FROM BRACKEN CIRCUIT.

Case 1.

1. In an indictment for keeping a tippling house it is sufficient to aver that the defendant kept a tippling house; without averring that he had not a license to retail spirits. (*Rev. Stat. 663.*)
2. Before the passage of the Revised Statutes it was necessary, where the object was to punish the defendant for keeping a tippling house, under color of keeping a tavern, as the penalty was different.

Judge SIMPSON delivered the opinion of the court.

June 7, 1853.

The presentment in this case was found by the grand jury, since the adoption of the Revised Statutes. It charges that the defendant did, on the 4th day of November, 1852, in the county of Bracken, keep a tippling house, without having first obtained a license to keep a tavern. On the motion of the defendant, the court quashed the presentment, on the ground that the offense set out therein, was not charged with sufficient certainty.

Case stated.

By the Revised Statutes it is enacted (page 663,) that "any person, unless he shall have a license therefor, who shall sell, in any quantity, wine or spirituous liquors, or the mixture of either in any house, to be drunk therein, or on or adjacent to the premises where sold, or shall sell the same, and it shall be so

COMMONWEALTH
vs.
HARVEY.

1. In an indictment for keeping a tippling house it is sufficient to aver that the defendant kept a tippling house—without averring that he had not a license to retail spirits. *Rev. Stat.*, 663.

2. Before the passage of the Revised Stat. it was necessary, where the object was to punish the defendant for keeping a tippling house, under color of keeping a tavern, as the penalty was different.

drunk, shall be deemed guilty of keeping a tippling house, and fined the sum of sixty dollars."

The objection made to this presentment is, that it does not negative the idea, that the defendant had a license to sell spirituous liquors, and that although he had not obtained a license to keep a tavern, yet he may have obtained a license by which he was authorized to sell spirituous liquors to be drunk in his house, and consequently was not guilty of keeping a tippling house.

If, however, he was guilty of keeping a tippling house, as charged in the presentment, the necessary conclusion is, that he had no license which authorized him to sell spirituous liquors to be drunk in his house, for it is the act of selling and allowing it to be drunk in his house without a license therefor, that constitutes him the keeper of a tippling house. If he have a license to do it, he cannot be guilty, under the statute, of keeping a tippling house, and therefore the averment that he kept a tippling house, negatives the idea that he had a license, and no additional averment is necessary.

By the laws in force, before the adoption of the Revised Statutes, a fine was imposed upon tavern keepers for keeping a tippling house under the color of a licensed tavern, and as the penalty for keeping such a tippling house was greater than that for keeping a tippling house without a license to keep a tavern, it was necessary that an indictment or presentment for keeping a tippling house should discriminate between the two offenses, and contain an averment which would define with certainty the one with which the defendant was accused, and therefore it was usual and proper to charge in the presentment, that the tippling house was kept by the defendant, without a license to keep a tavern, when such was the fact.

But no fine is imposed by the Revised Statutes for keeping a tippling house, under the pretence of keeping a tavern; the punishment for such an offense

consists in the suppression of the license of the tavern keeper. For the offense of keeping a tippling house, the statute provides only one uniform penalty, viz: sixty dollars, and this offense can, under the statute, be committed only by a person who has no license which authorizes him to sell spirituous liquors, to be drunk in his house; a presentment then, merely charging the defendant with having kept a tippling house, is good under the statute, and the additional averment in this presentment, that it was kept without a license to keep a tavern, was unnecessary, and must be regarded as mere surplusage. We are, therefore, of the opinion that the presentment in this case is sufficient, and that the court below erred in quashing it.

CRAWFORD'S
ADM'N.
vs.
BASHFORD.

Wherefore, the judgment is reversed and cause remanded, for further proceedings consistent with this opinion.

Harlan, Atto. Gen., for appellant; *Morehead and Brown*, for appellee.

Crawford's Adm. vs. Bashford.

ERROR TO GARRARD CIRCUIT.

Case 2.

When an appeal or writ of error is dismissed, whether by the party prosecuting it or by the court, the whole case is out of court, and no decision can be had upon cross errors of the appellee or defendant in error. (3 Stat. Law, 35.) Query. What would be the effect of dismissing an appeal before or after a cross appeal?

Chief Justice HISE delivered the opinion of the Court.

June 11, 1853.

[This opinion, though designated for publication, being written on the record, was overlooked and not published at the appropriate time.]

It is the opinion of the Court that when the appellant or plaintiff in error, in this Court, shall have his appeal or writ of error dismissed, whether upon his own motion or for other cause, in such case it follows, as matter of course, that the whole case is out

When an appeal or writ of error is dismissed, whether by the party prosecuting it or by the Court, the whole case is

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ROAD Co.
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peal?

of court, including the cross errors, should any have been filed by the appellee or defendant in error; whether in the Clerk's office or with leave of the Court. The act of February, 1838, (3d Statute Law, p. 35.) which authorizes the appellee or defendant in error, to assign cross errors, without prosecuting a cross appeal, or suing out a writ of error, and without filing any additional record, provides that, "In deciding *the case*, it shall be the duty of the Court to decide, as well the questions presented, on such assignment, as on the errors assigned by the appellant or plaintiff in error." The act gives no authority, therefore, to this Court to decide upon the cross errors, except when the whole case shall be decided by the Court, upon the original as well as the cross errors. As the authority to file cross errors and to decide upon them in any case, was given by and derived from the act referred to, and did not and could not exist before its passage, that authority must be exercised only in the cases, and in the manner as allowed by that act—that is to say, cross errors can only be decided and determined in cases where the original errors are also before the Court, to be also decided at the same time.

Wherefore, if the appeal or writ of error be dismissed by the Court, upon the motion of the appellant or plaintiff in error, or for other sufficient cause, then, of course, the cross errors are *coram non judice*.

J. Harlan, for plaintiff; *Burdett*, for defendant.

ORD. PET.

Wight vs. Shelby Railroad Company.
Allen vs. same.

CASE 3.

ERROR TO SHELBY CIRCUIT.

1. It is not a valid defense to allege that a subscription paper was delivered as an *escrow*, to become effectual on condition, when it was delivered to one of the Commissioners appointed to receive subscription to a railroad. It should have been delivered to a third person, to become effectual as an *escrow*.

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2. Parol evidence is inadmissible to vary the terms of subscription to a railroad, unless there is fraud or mistake in the execution of the same.
3. Subscribers for railroad stock must be presumed to know the provisions of the charter under which the subscription is taken.
4. The question whether an incorporated Company has been regularly organized, so as to give it power to act, cannot be inquired into collaterally. It must be by a direct proceeding. (5 *Litt.*, 45; 9 *B. Monroe*, 71.)
5. A subscription to stock in a railroad is not rendered invalid by reason of the subscriber failing to pay a small sum upon each share, when he subscribed; it was his duty to pay it—if he failed it was a failure of duty, and he cannot take advantage of his own wrong.

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vs.
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ROAD CO.
ALLEN vs. SAME.

The facts sufficiently appear in the opinion of the Court. *Rep.*

Judge STURSON delivered the opinion of the Court.

July 16.

As the same questions are involved in both of these cases, and as the validity of the defense presented in both, has to be examined in each case, we will proceed to consider and decide such questions as arise upon the record in either case.

The defense relied upon by Wight, that the subscription of stock made by him, was left with one of the commissioners in the nature of an *escrow*, is wholly invalid. The commissioners were the persons appointed by the charter to receive and accept subscriptions of stock. A subscription received by them, even if such a writing could, under any circumstances, be made to assume the nature and attributes of an *escrow*, could not take that character, inasmuch as when it was received by them, it became just as obligatory on the party making it, as a promissory note would be upon the maker who left it with the payee, or his agent. The well settled doctrine is that to make a writing an *escrow* merely, it must be placed in the hands of a third person by the party making it, to be delivered to the other party, on the happening of a specified contingency. Here the subscribers were the parties on one side, and the commissioners on the other. A subscription when made and received by the commissioners, could not therefore, be a mere *escrow*, but became in law an ab-

1. It is not a valid defense to allege that a subscription paper was delivered as an *escrow* to become effectual on condition, when it was delivered to one of the commissioners appointed to receive subscriptions to a railroad. It should have been delivered to a 3rd. person, to become effectual as an *escrow*.

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vs.
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ALLEN vs. SAME.

2. Parol evidence is inadmissible to vary the terms of a subscription to a railroad, unless there is fraud or mistake in the execution of the same.

3. Subscribers for railroad stock must be presumed to know the provisions of the charter under which the subscription is taken.

absolute undertaking for the payment of the stock subscribed according to the provisions of the charter.

So far as the defendants or either of them alleged that their subscription was conditional, and was not to be obligatory upon them, unless the road was located on a certain route, it is only necessary to remark, that the contract being in writing, parol proof is inadmissible, to alter its terms or to show, that instead of being absolute as it purports to be, it was in reality conditional. The subscribers might have annexed a condition to the terms of their subscriptions, if they had thought proper to do so, and it would then have been with the commissioners to determine whether such conditional subscriptions of stock would be received; but not having done so, they cannot, according to the well established doctrine on the subject, allege or prove that the contract was different from that which is evidenced by the writing, unless they can establish fraud or mistake in its execution.

If any representations made by the commissioners in reference to the locality of the road, could have the effect to render the subscriptions invalid, which we do not deem it necessary to decide, we are satisfied that no such state of case is presented in any of the answers as would authorize such a result. The duties and powers of the commissioners were prescribed by the charter. They had no power to locate the road, but its location depended upon the will of the President and Directors, when the company was organized. The subscribers must be presumed to have known the provisions of the charter, and knowing them, they could not have been deceived or mislead by any representations made to them on this subject by the commissioners. They do not allege that they were ignorant of the provisions of the charter, or even that they believed that the commissioners had power to locate the road, or that the commissioners represented to them that they had any such power, so that they fail to show that they could

have been deceived or mislead, with respect to this matter, by the commissioners. If they knew upon whom the power to locate the road devolved under the charter—and they must, as before remarked, be presumed to have known it, especially as they have not denied that they had such knowledge—they must have regarded any statements or representations, made by the commissioners on the subject, as a mere expression of their opinion about the matter, entitled to the same weight, and no more, that the opinion of any other individual was entitled to, and they could not have been deceived or imposed upon by it. Indeed, they no where allege that they relied upon the representations made to them by the commissioners, believing that they knew where the road would be located, or had any power whatever over its location. And as the act of incorporation is referred to in the subscription itself, and made a part thereof, it may well be doubted whether the subscribers would be permitted to deny a knowledge of its contents.

Whether the company was properly organized or not, according to its charter, is a question that cannot be made collaterally, but can only be made by a direct proceeding against the corporation. 5 *Litt.*, 45; 9 *B. Monroe*, 71.

As the stock subscribed by the defendant, Allen, is recognized by the plaintiffs as valid stock, and sued for as such, he has all the rights and privileges of a stockholder, and cannot invalidate his subscription by alleging that the stock had never been received by the commissioners, inasmuch as that allegation is contradicted, and disproved by the record.

The failure to pay the sum of one dollar on each share of stock subscribed, cannot certainly be relied upon by the subscribers as exonerating them from their liability for their subscriptions. It was their duty to pay it at the time the stock was subscribed, but they should not be allowed to take advantage of their own wrong, and release themselves from their

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vs.
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ROAD CO.
ALLEN vs. SAME.

4. The question whether an incorporated Co has been regularly organized so as to give it power to act, cannot be inquired into collaterally. It must be by a direct proceeding. (5 *Litt.*, 45; 9 *B. Monroe*, 71.)

5. A subscription to stock in a railroad is not rendered invalid by reason of the subscriber failing to pay a small sum upon each share when he subscribed—it was his duty

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to pay it, if he failed it was a failure of duty, and he cannot take advantage of his own wrong.

whole obligation by a failure to perform a part of it. Even if the commissioners might have refused to receive the stock unless the payment had been made, yet, as they did not do it, the contract was, after the stock had been received without the payment, binding upon both sides.

The decision of the Court in the case of the *Union Turnpike vs. Jenkins*, 1 *Caine's Reports*, sustains the views expressed in this opinion—and it is only the opinion of the dissenting Judge that is cited in *Angel and Ames on Corporations*, and referred to by the counsel for the appellants.

The decisions of the Massachusetts courts, on some of the questions involved in these cases, have not been followed by this Court.

In our opinion none of the defenses presented by either of the appellants was a sufficient answer to the plaintiff's action.

Wherefore, the judgment in both cases is affirmed.

T. W. Brown and *W. D. Reed* for appellants;
Throop, Bullock and *Lindsey* for appellee.

Martin vs. Martin

APPEAL FROM ANDERSON CIRCUIT.

Case 4.

A purchaser of land under a decree, made the purchase for about one third of the value of the land, and holding the land under an assurance of the purchaser, by parol, made to the debtor, that he might redeem, sold the benefit of his purchase to a third person, who promised the debtor and purchaser to extend the privilege of redemption to the debtor: held, that though the agreement was by parol, that it was a trust which the purchaser could not refuse to perform, and redemption allowed.

The facts are stated in the opinion of the Court.

W. W. Penny, for appellant—

The facts in the case show that Walker, as commissioner of the Anderson Circuit Court, appointed at the June term, 1845, sold 39 acres of land belonging to the appellant, Josiah Martin, to satisfy a de-

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eree in behalf of Lancaster and Lillard, obtained upon a mortgage. John Draffin bought the land for Josiah Martin, the debtor, as he did not wish to see it sacrificed, and shortly afterwards saw Martin and so informed him in October, 1845. John Draffin transferred the benefit of his purchase to the appellee, E. Martin, as he says under the following circumstances: "Some short time after my purchase I was applied to by H. Martin, who is the brother of Josiah Martin, who agreed to take my place and pay the money bid by me for the land, and when his brother could pay him he could have the land." Upon this understanding he transferred his purchase to E. Martin. Thus the case stood until May, 1851, when E. Martin filed Draffin's assignment in court, and procured an order for a conveyance of the land to himself. To redeem the land and cancel this deed, and have the possession surrendered, is the object of this suit.

1. It is insisted for the appellant that E. Martin is in no better condition than John Draffin, who was the attorney of the creditor, (2 *B. Monroe* 409,) and moreover, E. Martin purchased of Draffin, with full knowledge of the nature of Draffin's promise to permit a redemption, and further expressly agreed to permit J. Martin to redeem, as proved by Cleave-land.

2. The commissioner never made any report of his sale of the land, no decree was ever made confirming the sale, which is essential to confer a valid title. (*Foreman vs. Hunt*, 3 *Dana*, 622; *Cassel vs. Johnson*, 4 *Dana*, 186.)

3. If the deed transferred any title it is held in trust for the appellant, as it was obtained in violation of the trust, and in violation of that friendship which should ever characterise the conduct of a brother.

A reversal is asked.

G. W. Kavanaugh, for appellee—

It is conceded by both parties that the land in con-

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test belonged to Draffin, absolutely and unconditionally, by virtue of his purchase under the decree in chancery. He assigned the benefit of the purchase to the defendant, in writing, and it is now contended that he made a verbal agreement with Draffin, at the time, to let plaintiff have the land, but no recovery can be had upon any such agreement as that. If Draffin had sold any other tract of land to defendant, with a verbal understanding that he should let plaintiff have it, there is no process known by which such agreement could be enforced—for the written contract can in no wise be varied or changed—it was Draffin's intention to bestow a favor upon the plaintiff; if he has been prevented from doing so by a contract which the defendant has obtained from him, he is the only man who can complain and ask a rescision. Plaintiff cannot ask relief upon the ground of resulting trust, or agency on the part of defendant, for his right to the land was gone, and he furnished no money to re-purchase it. He has not so much as shown that his brother was acting for him, in buying the land from Draffin.

According to Draffin's deposition there was a loose understanding when he assigned his purchase to defendant, that plaintiff should have the land. If Draffin should now seek to vacate the assignment, upon the ground that defendant had defrauded him in obtaining it, by promising to let his brother have it, and it should be made to appear, as in this case, that according to promise, defendant continued to offer it to plaintiff for more than five years, and that plaintiff failing and refusing to take it, defendant then disregarded the promise and treated the land as his own, it would hardly be said that he had been guilty of fraud; on the contrary, it would be clear that he had complied with the promise in good faith, and had given all the time to plaintiff that any reasonable man could ask, and that if he now loses the land, it is by his own inexcusable negligence and sloth. He would have better grace in his case if he had even

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offered the money, which he admits himself bound to pay, but he brings his suit without tendering the money defendant has already paid; wherefore, the decree should be affirmed.

Judge CRENSHAW delivered the opinion of the Court.

The plaintiff, Josiah Martin, in his petition, alleges substantially, that his land had been sold by virtue of a decree of Court, and that John Draffin had become the purchaser, at a sale made under the decree, for the sum of \$87 80; that the purchase had been made at a sum greatly below the value of the land; and that his brother, Edward, having heard of the sale, applied to him, the plaintiff, "to let him have the money, and stated that he would pay it to Draffin and get his transfer, and would take the land and hold it, and tend it for the interest on the amount that he should have to pay for him, until the plaintiff could pay the money back; that he had better do this than to let it stand as it was; that Draffin would, if he could, hold the land, which was worth four times what Draffin had paid for it." The plaintiff further alleges, in substance, that he told his brother, Edward, that Draffin had said repeatedly, that he had bought the land for the plaintiff, and that all he wanted was his money; that he wanted to make nothing out of the plaintiff; that he had indulged him, and still intended to do so; that it was finally agreed between him and his brother, that his brother should see Draffin and pay him the money, and take the land and hold it for him in the same way in which Draffin had held it, except that his brother was to cultivate the land for the use of the money, until it should be paid back to him. Edward Martin afterwards applied to Draffin for the land, and, in the interview between them, Draffin informed him that he had purchased the land for his brother, the plaintiff, and had told him so, and that the plaintiff had agreed to raise the money which had been bid for the land, and take it. Draffin also informed Edward that, if the plaintiff was to have the land, Edward could take it—that he

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had bought the land for the plaintiff, and his object was for him to have it. Edward replied to Draffin that he would take his (Draffin's) place, and that, when the plaintiff could pay him back the money, he should have the land; and, upon this understanding, as Draffin says, he transferred to Edward the benefit of his bid. Edward afterwards applied to court, and by virtue of this transfer, the court directed the commissioner, who had made the sale, to convey the land to Edward, and it was conveyed to him accordingly.

The defendant, in his answer, does not deny the foregoing facts stated by the plaintiff, but sets out the agreement somewhat variant in this: that the plaintiff was to have only five years in which to pay the sum (\$87 80) advanced by the defendant to Draffin for the land; and relies that, the agreement having been made about the year, 1845, the time of redemption had expired about the year, 1850, and no offer had been made to pay the money until about the first of January, 1853. He relies also upon the statute of frauds and perjuries; and this latter defense constitutes the only difficulty in the way of the plaintiff to relief. As to the lapse of time, it is questionable whether five years were fixed upon in the agreement, as the time which the plaintiff should have to redeem in. Draffin says that, in the interview between him and Edward, no time was mentioned as a limit on the right of the plaintiff to redeem. After the agreement had been made between the plaintiff and the defendant upon the subject of the land, and after the defendant had procured the transfer from Draffin, as it appears from the testimony of Long, the defendant, in a conversation with the plaintiff, told the plaintiff that he *would* give him five years to redeem, to which the plaintiff does not appear to have made any reply. Cleaveland proves that the defendant, in speaking of the transaction, remarked that he *had* given the plaintiff five years to redeem in. But, there is nothing to show that this

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period had been fixed upon in the original agreement, except the declarations of the defendant, and the silence of the plaintiff when one of these declarations was made, and this silence was on the occasion when the defendant said he *would give* five years to redeem in, and was not when the original agreement was made. But, under the view which we have taken of this case, it is not material whether this period of five years was the limit fixed in the original agreement to the right of redemption or not. The time of redemption, according to the declarations of the defendant, as proved by Cleaveland, was extended for five years longer, and before the expiration of this latter period this suit was brought. But, if the land was held by the defendant as a mere security for the money which he had advanced, and there was a legal right to redeem, the time would not be material.

It is stated by the plaintiff that, at the time when the defendant applied to him and offered to advance the money to Draffin, he was anxious to pay off the debt to Draffin of \$87 80, and he *was*, doubtless, anxious upon the subject; for, the said sum of \$87 80 was but about one fourth the value of the land, at that time, as is manifested by the testimony; and we think the probability is, that he would have raised the means from some other source than from the defendant, to redeem the land, had not the defendant offered to advance the money. By his interposition, he prevented the plaintiff from looking to any other source for aid in his embarrassment, and procured Draffin's transfer, and now insists upon holding the land to the great sacrifice of the interests of the plaintiff. To permit him to do so, would operate a hardship upon the plaintiff, and allow the defendant to take advantage of his own wrong, and thereby enrich himself at the expense of the plaintiff. This ought not, and cannot be suffered, unless the statute of frauds interposes an insurmountable obstacle.

At the time of the arrangement between the par-

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A purchaser of land under a decree made the purchase for about one third of the value of the land, and holding the land under assurance of the purchaser by parol, made to the debtor, that he might redeem, sold the benefit of his purchase to a 3rd person, who promised the debtor and purchaser to extend the privilege of redemption to the debtor; held that though the agreement was by parol that it was a trust which the purchaser could not refuse to perform and redemption allowed.

ties for the redemption of the land from Draffin, he held it in trust for the plaintiff, having purchased it *for him*, as appears from his own statements and conduct. True, the trust was not an enforceable one, but, it was a trust in fact, which he was willing to fulfill, and which, in consequence of the representations made to him by the defendant, he thought he *was* fulfilling, in making to the defendant the transfer. The fact that the trust in the hands of Draffin did not constitute an enforceable equity, at the time of his transfer to defendant, is the only thing which distinguishes this case, in principle, from that of *Griffin and wife vs. Coffee*, reported in 9 B. Monroe, 452. In that case property had been sold under execution, which was subject to be redeemed by the debtor, and the sheriff made a deed to the purchaser. On the last day for the redemption of the property, and whilst an execution was in the hands of the sheriff, for the purpose of being levied upon the equity of redemption, to realize the remainder of the debt not made under the first execution and sale, Coffee paid to the creditor, who was the purchaser under the first execution, the full amount of his whole debt, and took from the creditor a conveyance of the property. This Court, being satisfied that the redemption and purchase of the property by Coffee, had been made at the instance of the debtor, and in trust for him, was of opinion that the debtor had a right to reclaim the property, upon Coffee's being paid what he had expended for it, and that the statute of frauds did not constitute a bar to relief. In that case, Coffee acquired a conveyance for the property whilst it was, *by law*, subject to redemption. In this case, the property was acquired by the defendant, when the plaintiff had no right or power, *in law*, to redeem or repurchase, but Draffin bought the property *for* the plaintiff, and was, in fact, holding it in trust for him, and the right to redeem being conceded, he could as effectually have obtained it, as if, *by law*, he could have enforced its surrender. He was as effectually

lulled into repose, and his exertions to make a personal redemption from Draffin were as certainly prevented by the arrangement with the defendant, as was the debtor by the arrangement with Coffee prevented from a redemption in person, in the case quoted from 9 *B. Monroe*. In this case, as in that, to apply the statute of frauds as a barrier to relief, would be to make the statute an instrument for the perpetration, instead of the prevention, of frauds. We think the plaintiff was entitled to relief.

Upon the return of the cause, if the plaintiff should bring the amount of money without interest into court for the defendant, which was advanced by the defendant to Draffin, it should be ordered to be paid to the defendant, and he should be directed to convey the land to the plaintiff, which conveyance and payment should be concurrently performed. If the plaintiff fail to bring the money into court, the land, or so much thereof as will be sufficient for the purpose, should be directed to be sold to raise the sum advanced by the defendant to Draffin. And, such other orders should be made as will comport with the principles of equity.

Wherefore, the judgment is reversed, and the cause remanded for further proceedings and decree, in conformity to the principles of this opinion.

Walston vs. Commonwealth.

INDICTMENT.

APPEAL FROM ANDERSON CIRCUIT.

Case 5.

1. The dying declarations of a person who is wounded, is clearly admissible evidence against a person charged with homicide, according to the English Common Law, and is not changed by our laws. (*Greenleaf on Ev.*, 126.)
2. But to render dying declarations admissible, they must be made *in extremis*, under a solemn sense of impending dissolution. In such a situation every motive to falsehood is presumed to be silenced, and every motive to truth in lively exercise. Its credibility is, however, to be decided by the jury.
3. The rule of law admitting dying declarations to be given in evi-

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dence against the accused in trials for homicide, is not changed by any Constitutional provision of Kentucky. The Constitution does not change the rules of evidence which existed at its adoption, but only secures to the accused the right to confront the witnesses who may be introduced against him to prove such matters as were, according to the settled principles of law, evidence against him. The law determines the admissibility of testimony. The Constitution secures to the accused the right to confront the witness who details that testimony, face to face. (*Woodrife vs. the State, Howard's Miss. Rep.*, 655; *Anthony vs. the State*, 1 Meig's, 265.)

4. The only grounds upon which a judgment can be arrested in a criminal case, is that the facts stated in the indictment do not constitute a public offense within the jurisdiction of the Court.—(*Criminal Code*, sec. 270.)
5. The Criminal Code giving the right of peremptory challenge to the Commonwealth, in criminal cases, applies as well to trials in prosecutions commenced before, as to those commenced after the first day of September, 1854. (*Criminal Code*, sec. 1, 2 and 23, chap. 21, page 191.) This is not an *ex post facto* law. (*Calder, et ux. vs. Bull, et ux.* 3 Dallas, 386; 12 Wheaton, 480; 3 Grattan, 632.) The words *ex post facto* relate to crimes, and not to criminal proceedings.

The facts of the case are stated in the opinion of the Court.

Thomas N. Lindsey, for the appellant—

On the trial of this case, in the court below, two questions arose which it is believed were decided erroneously, and to the prejudice of the appellant. First, as to the right of the Commonwealth to three peremptory challenges, which was allowed; Second, the right of the appellant to have the regular panel of jurors exhausted, before calling by-standers—which was denied by the Court.

It was supposed by the Attorney for the Commonwealth, and so decided by the Court, that the Code of Practice in criminal proceedings was applicable to this case. This was denied by the counsel for appellant, and is now disputed.

By the act of the Legislature adopting the Code, it is insisted that the Legislature did not intend to apply its provisions to the trial of cases which had occurred before the passage of the act, and the prosecution commenced under the existing laws, but that such prosecutions should be conducted under the laws

as they then existed. And though the Legislature meant that after the first of July, 1854, the proceedings should be under the Code, it was not intended to invalidate or affect by the Code any proceedings begun before the first of September, 1854; but that all proceedings began before the last date should be conducted under the old laws, to their conclusion, as if the Code had not been adopted—still, as is supposed, giving the benefit of an appeal.

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No doubt the Legislature supposed the Code would be distributed and its provisions known before the first of July, and that offences committed between the passage of the act and the first of July might be prosecuted under its provisions; yet, as it might not be known, it was provided that all prosecutions begun before the passage of the act, or before the first of September, under the old forms, should be concluded under the laws existing at the adoption of the Code. How is it possible to withdraw the operation of the second section of the foregoing act from cases where the prosecutions had been commenced before the passage of the act, and limit them to those begun under the old forms between the first of July and first of September? No such idea is to be gathered from the statute. There is nothing in it which indicates a purpose to apply its provisions in any respect to proceedings begun under the old forms; but whenever begun under the old forms before the first of September, 1854, they were to be conducted, to their conclusion, under the laws existing at the adoption of the Code, as far as the old law applied. Then the Code gave the right of appeal after the first of July. This view will avoid a constitutional question, and be giving the law such a construction as it is believed was intended by the Legislature.

If this interpretation be adopted, it follows that the Commonwealth had no right of peremptory challenge; because before the adoption of the Code, and according to the laws existing at its adoption, no such right existed. (1 *Stat. law*, 528.)

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But if this interpretation is not sustained, and the provisions of the Code shall be construed to apply to an act done before the adoption of the Code, and to a proceeding or prosecution commenced under the old laws, then it is insisted that a constitutional question arises. The twentieth section of the bill of rights declares "that no *ex post facto* law, or law impairing the obligation of contracts, shall be made." And the Constitution of the United State, art. 1, sec. 9, contains the same inhibition.

The case of *Calder and Wife vs. Bull and Wife*, 3 Dallas, 386, defines what is meant by *ex post facto* laws, in these terms: "First, Every law that makes an action done before the passing of the law—and which was innocent when done—criminal, and punishes such action. Second, Every law which aggravates a crime or makes it greater than it was when committed. Third, Every law that changes the punishment and inflicts a greater punishment than the law annexed to the crime when committed. Fourth, Every law which changes the legal rules of evidence, and receives less or different testimony than the law required, at the time of the commission of the offense in order to convict the offender." These principles have been recognized by the Court of Appeals of Kentucky in the case of *Davis vs. Ballard*, 1 J. J. Marshall, 578; *Fisher vs. Cockerill*, 5 Mon., 133. To apply the code to this case will give its provisions a retroactive operation.

In *Walker's Introduction to American law*, page 195, a better definition is given of *ex post facto* laws. He says, "these have been decided to be retroactive criminal laws, and none other;" referring to the case of *Calder vs Bull*, *supra*, he deduces the meaning to be "that men may be benefitted, but shall not be injured by laws which did not exist when the act was done, and therefore we are safe against retroactive criminal laws." The same author, page 446, treating of crimes and punishments, and the operation of criminal laws under our Constitution, says: "They

must be declared before hand; not only must all offences be expressly provided for, but the law must be made before the act is done. In other words, there can be no retroactive criminal legislation; and this doctrine prevails throughout the United States; both the Federal and the State Constitutions, as we have seen, prohibit the enactment of *ex post facto* laws, and by them, as we have seen, are meant retroactive criminal laws. Any law, therefore, which makes criminal an act which was innocent at the time of its commission, or which renders conviction more easy than it was when the crime was committed, would be unconstitutional and void."

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But it is presumed that laws which favor the offender by diminishing the punishment, or renders conviction more difficult, would be valid, although retroactive, because they operate for the benefit of the accused. Walker refers to the following authorities: "*Gibmore vs. Skata*, 1 *Levinz* 227; *Conele vs. Jeffries*, 4 *Burrows* 2460; *Cail vs. Haggan*, 8 *Mass. Rep.* 423; *Dash vs. Van Kluck*, 7 *John*, 477; *Caldor vs. Bull*, 3 *Dallas*, 386; *Fletcher vs. Peck*, 6 *Cranch* 87; *McCormack vs. Alexander*, 8 *Ohio Rep.* 66; *Ogden vs. Blackledge*, 2 *Cranch*, 194; *Society &c. vs. Wheeler*, 2 *Galtison*, 105. A statute will not be allowed to have a retroactive effect unless the terms clearly indicate the Legislature so intended it. (*Jarvis vs. Jarvis*, 3 *Eng. Chancery* 462; *Head vs. Ward*, 1 *J. J. Marshall* 280.) A State may pass a retroactive law which impairs her own rights. (*Davis vs. Davis*, 4 *Watts and Seargt.* 401.)

The Statute of Georgia prescribing the questions to be proposed to the jury on *voire dire*, was held to be constitutional, (*Boone vs. State*, 1 *Kelly*, 618,) but held not to apply to a case which arose before the passage of the act. (*Reynolds vs. State*, 1 *Kelly*, 222.)

If the Commonwealth had not the right to challenge jurors, as allowed, the appellant was deprived of the right to accept and be tried by such as were rejected by the Commonwealth; and it is not for the

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Court or the accused to speculate on the chances how those three rejected jurors would have decided, or what would have been the verdict with or without them.

If the appellant had a constitutional right to be tried by the laws under which he was indicted, and for an act committed during the existence of those laws, and the Code can be construed as applying in any point of view to the case, to his disadvantage, that far the Code is *ex post facto* in its operation, and void.

The only other question to be noticed on this appeal, is the admission of the dying declarations of Montgomery, the person killed. The English authorities are relied on to prove their admissibility in the courts of this State where they have been admitted. The practice is not understood to have been uniform in this State; and the admission of such evidence is regarded by the counsel in conflict with that provision of the Constitution, which secures to the accused the right of meeting the witnesses face to face. This provision was intended to exclude *ex parte* depositions and examinations before magistrates, and these cannot now be used; but they are much less dangerous than such proof of dying declarations as we have in this case. Such examinations were had in reference to perpetuating in a certain form, under the solemnity of an oath, the whole transaction as it happened, and the party making such declarations made them under a sense of duty, and an obligation to state the truth and the whole truth, understanding the purpose of the examination to be the preservation of his statements for evidence. Here it is evident the wounded man knew nothing of the purpose for which the interrogations were made by Dr. Mills, except to ascertain his position when shot. The wounded man might well have supposed the Doctor's purpose was merely to ascertain the direction of the ball. These statements of Montgomery, Mills was permitted to detail. Was it Mills' evidence or Montgomery's

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that operated upon the jury? Montgomery's testimony did the mischief to Walston, not told by himself, but in an impressive form and manner by one who was testifying in truth and with terrible effect for Montgomery, and in a way that Montgomery himself, if he had been present, never could have impressed the jury. It may be said that the other witnesses so far contradicted the declarations of Montgomery, as to the position he occupied when Walston shot, that the effect ought to have been destroyed. The description of Montgomery's suffering—his conviction that he was about to die—Mrs. Montgomery's fainting—Mills' impressing Montgomery with the certainty that he must die—this to let in the statements, and then not only his statements of what was done, but what were his intentions and purposes—all kind and pacific—would weigh before ninety-nine jurors out of every hundred, tenfold more than the statements of witnesses brought face to face with the accused, and subjected to cross-examination.

If dying declarations are to be allowed in this Commonwealth as testimony, it is to be hoped that the Court of Appeals, in sanctioning it, will so guard the admission, that the injured party in making the declarations, may know that he was interrogated for the purpose of having the whole truth stated. The danger of allowing mere answers to interrogatories, with nothing to show that the declarant understood that he would be expected to state the whole transaction, as it occurred, is too frightfully dangerous for a moment to be tolerated as a fixed legal rule of evidence in a government, the fundamental laws of which provide as a security to the citizen the right of meeting his witnesses face to face, in all criminal accusations preferred against him.

The admission of this character of proof is a common law rule, and if our constitutional provision was not intended to alter it, then it could only have been intended to prevent the use of depositions—much less dangerous than dying declarations—as cross-ex-

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aminations could always be had in such cases. Two cases only are found where it has been held that the admission of dying declarations does not conflict with the constitutional provision requiring witnesses to be brought face to face with the accused. (*Anthony vs. The State*, 1 Meigs, 268; *Woodside vs. The State*, 2 Howard Miss. Rep. 655; *Note to 1 Greenleaf*, page 207; *Id. Sec. 157*.)

J. Harlan, Attorney General, for the Commonwealth—

The Grand Jury for Franklin county, at its July term, 1852, returned an indictment for murder against George W. Walston for having in the month of May, of the same year, shot at and killed Jephtha Montgomery. A trial was had at the succeeding October term, and the jury having disagreed were discharged.

During the winter following, Walston obtained a change of the venue to the county of Anderson, and a trial was had in that court at its April term, 1854, and the jury found a verdict for manslaughter, and fixed the punishment of four years in the penitentiary. The court granted a new trial on the motion of the prisoner, because of the separation of the jury during the time they had the case under advisement.

At the last April term another trial was had, and the prisoner was again found guilty of manslaughter, and his punishment fixed at two years confinement in the penitentiary. A motion was made for a new trial, assigning various grounds therefor, all of which were overruled and judgment rendered according to the verdict of the jury. The Chief Justice having allowed an appeal under the provisions of *section 329 of the Criminal Code*, the case is now presented to this court for affirmance, reversal or dismissal.

The Code (*section 334*) allows an appeal to the defendant in the following cases :

1. An error of the Circuit Court in admitting or rejecting important evidence.

2. An error in instructing or refusing to instruct the jury.

3. An error in failing to arrest the judgment.

4. An error in allowing or disallowing a peremptory challenge.

As the grounds for a new trial do not embrace either of the two first, (except perhaps the dying declarations of Montgomery) the case will be considered on the third and fourth.

1. As to the third. There was no error in overruling the motion in arrest of judgment.

The causes on which this motion may be grounded, although numerous, are confined to objections which arise upon the face of the record itself, and which make the proceedings apparently erroneous; and, therefore, no defect in evidence or improper conduct on the trial, can be urged in this stage of the proceedings. (4 Burr. 2287; 1 Lord Raym. 231; 1 Salk. 77, 315; Com. Dig. Indictment N.) The cause for an arrest of judgment must appear *on the face of the record*, and not for any extraneous matter.

In this case, the indictment, proceedings in court, form of verdict, judgment, &c., appear to be regular and consequently there is no ground to arrest the judgment. The terms "arrest of judgment" are used in the Code of Practice in their legal sense.

2. The fourth ground is as to the right of the Commonwealth to challenge peremptorily five jurors.

The right of challenge did not exist when the offense was committed, nor until after two trials of the case; and whether this change in the mode of proceeding impairs, substantially, the constitutional rights of the accused, or should be regarded as a change in the form of trial, is the question to be decided.

I admit it is a question of much difficulty, and I can find no case directly applicable. It was decided at an early day, by the Supreme Court of the United

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States, that the words *ex post facto* applied to criminal cases only. See, *Calder and Wife vs. Bull and Wife*, 3 *Dallas* 386. It was decided in that case—
1. That every law that makes an action done before the passing of the law, and which was innocent when done, criminal, and punishes such action. 2. Every law that aggravates a crime, or makes it greater than it was, when committed. 3. Every law that changes the punishment and inflicts a greater punishment than the law annexed to the crime when committed; and 4. Every law that alters the legal rules of evidence, and receives less or different testimony than the law required at the time of the commission of the offense, in order to convict the offender—all of these are unjust and oppressive, and come within the interdict of the Constitution against *ex post facto* laws.

I find in the *United States Digest*, annual for 1847, p. 126, sec. 14, the following: "The constitutional provision forbidding *ex post facto* laws, relates to crimes and punishments and not to criminal proceedings." (*Perry's case*, 3 *Grattan* 632.)

Is not the question at last, whether the prisoner had the benefit of a fair trial before a jury selected by himself?

But it is insisted that the act adopting the Criminal Code excludes that part of it which gives to the Commonwealth a peremptory challenge to five jurors. If the Code is to receive that construction, the court must carry it out to its full extent.

The act adopting the Code provides that all prosecutions that may be commenced before the 1st September, 1854, and which, by the existing laws, would be valid, shall not be rendered invalid by this act, "*but may be prosecuted to their conclusion and enforced according to the existing laws, as if this act had not been passed.*"

It is submitted then, whether this case throughout should not have been *carried on and enforced* by the laws in force at the time the offense was committed and the prosecution set on foot?

It has been argued that the Circuit Court erred in permitting the declarations of Montgomery, given *in extremis*, to be given in evidence. All I have to say on that point is, that this question has been settled, both by English and American courts in conformity to the ruling of the Circuit Court. (1 *Greenleaf Evidence*, sections 156, 157, &c.)

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Thomas F. Marshall, in reply, for the appellant—

Upon the trial of this cause, believing that the new Code of criminal practice for Kentucky, was intended to apply to it, and that the provision allowing the Commonwealth the right of five peremptory challenges, was not inconsistent with the Constitution of the United States and that of Kentucky, the Circuit Judge permitted the Commonwealth, in the selection of the jury, to reject three without cause, who were otherwise legally unexceptionable, and acceptable to the accused. The appellant assigns this for error:

1st. Because if the Legislature intended the provision to apply to prosecutions already commenced and pending at the date fixed for the establishment and commencement of the operation of the new Code, which was the fact in relation to the indictment against Walston, then this provision of the Code was *ex post facto* in its operation upon this case, and therefore unconstitutional and void. The formation of the jury, and the rights of the Commonwealth in its selection, were regulated and to be determined according to the laws existing at the time of the indictment found, which laws confined the Commonwealth to challenges for cause.

2nd. If the new Code intended by its own terms or the fair construction of them, to limit the operation of the Code, in the provisions changing the mode of trial under former laws, to such cases as should arise after the date fixed for the operation of the Code by the act prefixed to it, then the court violated the Code itself in allowing the challenges, which, as already shown, were a violation of the laws existing before

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the establishment of the new Code. It is not intended here to argue the first ground of objection, that the Code, if it was intended by the Legislature to apply to cases commenced before the date fixed for its establishment was *ex post facto*, and unconstitutional. It is conceived that my colleague, Mr. Lindsey, has exhausted the argument and the authorities. It is upon the use made by the Attorney General, of the second hypothesis, which is the one to which he leans, that my observations are directed. From the second section of the act of Assembly preliminary to the Code, that gentleman infers that the entire new Code of Practice in criminal cases in Kentucky, was restrained and confined to cases commenced after the first day of September, 1854, and that cases commenced before that date *must* be prosecuted to their conclusion, and enforced according to the laws existing at the time of their commencement, as though the act establishing the new Code had not been passed. Now, as appeals were not allowed before the passage of that act, it follows according to the argument of the Attorney General, that Walston's case being commenced before the first day of September, 1854, must be prosecuted to its conclusion, and the judgment of the Circuit Court enforced according to the laws existing at the time of the passage of the act establishing the Code, which allowed no appeal in indictments for murder. This argument admits the error of the Circuit Court in trying the cause under the new Code of criminal practice. The Circuit Court committed the error under the impression that if its decision were erroneous, this court had appellate jurisdiction, and could and would correct it. Walston, according to the argument, should have been tried according to the laws existing at the time of the commencement of his prosecution, and was not. He was tried and wrongfully tried under the Code against its provisions. The verdict and judgment were illegal. If the verdict had been "guilty of murder" and the sentence death,

it would not have changed the case or affected the argument. He must have died by an illegal sentence, contrary to the express provisions of the very Code which gives appellate jurisdiction in criminal cases, and specifies as one of the errors of which this court has jurisdiction, and as cause for this reversal of a judgment of conviction, "an error in allowing or disallowing a peremptory challenge." The Code of Practice is allowed to operate in the Circuit Court; the illegal destruction of a human being contrary to its spirit, expressed in its letter, by which the codifiers, of whom the Attorney General was one, vainly attempted to guard against its unconstitutional *ex post facto* operation. And its operation is denied in this court, where the jurisdiction given was expressly intended to correct errors of the very sort, charged and admitted. This murderous statute is to operate where it destroys, and to be arrested where its operation would be beneficial to life or liberty. It is perfectly clear that if the construction given by the Attorney General be the true one, the Circuit Court has erred, and this court, unless its appellate jurisdiction is taken away by the same construction, must reverse the judgment. Admitting that this prosecution should have been conducted to its conclusion, according to the laws existing at its commencement, and that the Code has excepted it from its provisions, has the section already referred to, deprived this court, in this case, of the appellate jurisdiction subsequently conferred, and of the judicial power to remedy an error actually committed by the Circuit Court, expressly forbidden by the Code itself, and provided for expressly in the fourth specification of errors, under the title "appeals" as giving jurisdiction to this court, without any reference there, or limitation of the power of this court to arrest the judgment for such error, to the date of the indictment, or commencement of the prosecution? Whatever may have been the laws existing at the time of the commission of the act, the finding of the indictment

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or the commencement of the prosecution, at the time of the trial, the finding of the jury and the judgment of the Circuit Court, this court had then appellate jurisdiction in criminal cases.

Whatever may be the true construction of the second section of the preliminary act, under whatever law the Code designed "prosecutions or proceedings in criminal cases commenced before the first day of September, 1854, to be conducted to their conclusion," we deny that the appellate jurisdiction conferred subsequently by the Code is affected in the least or limited by that section. On the contrary, we affirm that the possible errors into which the inferior courts might be led by an improper construction of that section, and the actual error in its construction, into which the Judge of the Anderson Circuit has been led, as shown and argued by the distinguished Attorney General, one of the authors of the Code, afford the very strongest ground for maintaining and preserving the appellate jurisdiction over that very class of cases where errors were most likely to be committed. I have shown the inevitable consequences of the Attorney General's argument in this very case. Before this court will allow such to follow, they will, I am sure, give to the section and to the title conferring appellate jurisdiction, the most jealous scrutiny; anxious to prevent results scarcely less than iniquitous, results that can with difficulty be supposed to have been within the views and purposes of a legislature engaged at the very time in the adoption of a statute designed to enlarge the securities of life and liberty, by providing a judicial power of superior revision, in cases where theretofore the decisions of inferior courts had been final.

"The Code of Practice, in criminal cases in Kentucky," is itself an act of assembly, and derives its authority from the sanction of the Legislature. In *title 9, article Appeals, section 327*, it provides that "the Court of Appeals shall have appellate jurisdiction in prosecutions for felonies, subject to the restrictions

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contained in this article." By the first section of the preliminary act it is declared "that the provisions of this act shall regulate the proceedings in all prosecutions and penal actions in all the courts of this Commonwealth, from and after the first day of July, 1854, and shall be known," &c. The third section declares "that all laws coming within the purview of this act shall become repealed when this act goes into effect, *except as provided* in the last (the second) section." Now, the act goes into effect the first of July, 1854, and shall regulate the proceedings in all prosecutions, &c., from and after that date without reference to the time of their commencement, so far as the first section is concerned, which fixes the date from which the act is to take effect. By that section the appellate jurisdiction of this court in prosecutions for felonies is established among other provisions of the Code, and made to commence from the first day of July, 1854. Is that jurisdiction, thus distinctly conferred, and its date thus distinctly fixed, modified or suspended by the second section, so as to defer the time of its commencement till the first of September, 1854, and to limit it to cases commenced after that date? The spirit of the act and the reason of the thing, I think, has been shown to be against such a construction. The strictest grammatical analysis, the closest and most literal verbal criticism of the entire section by itself, without reference to anything else, will not sustain, as I think, the construction contended for by the Attorney General so far as the appellate jurisdiction is concerned.

The language of the section is "That all prosecutions or proceedings in criminal or penal cases which shall be commenced before the first day of September, 1854, and which, *by the existing laws, would be valid*, shall not be rendered invalid by this act, but may be prosecuted to their conclusion, and enforced according to the existing laws, *as if this act had not been passed.*" The last words which I have italicised, it is contended, taken strictly, leaves the class of cases

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referred to in the section, as though the Code were not in existence; and without the Code there is no appeal. Walston's case belongs to that class, clearly, as having been commenced before the first day of September. As to Walston's case, therefore, there is no Code, it stands as though that act had not been passed. This is the rigorous logic of the Attorney General, thrown into the syllogistic form, regardless of the legal or moral consequences which flow from the conclusion to which it leads. To pursue the phraseology strictly of this second section, and without taking the first into consideration, or seeking to give it any effect whatever, we say first, that the second section confirms all proceedings in criminal cases commenced before the first day of September, 1854, *which, by the existing laws, would be valid*, and none other. Are the proceedings in Walston's case, to which we object, *valid* under the laws existing before the establishment of the code? Most clearly not. By these laws no challenges to jurors were allowed the Commonwealth except for cause. "Proceedings commenced before the first day of September, 1854, and which, by the existing laws, would be valid, shall not be rendered invalid by this act, but may be prosecuted to their conclusion, and enforced according to the existing laws, &c." The proceedings in Walston's case, if valid under the existing laws, would not, it is admitted by us, have been rendered invalid by the Code, but must have been prosecuted to their conclusion as though the Code had not been passed. The right of appeal under its specifications would not have been taken away, but under such a case the appeal would not have applied; there would have been no error, and this court could not have arrested the judgment. But if the proceedings in Walston's case had been invalid under the laws existing at the time of their commencement, can any construction of the second section, so often cited, render them valid? Can they be prosecuted to their conclusion, and enforced according to the existing

laws, as though the act establishing the Code had not been passed? Does that section provide for the enforcement of proceedings *invalid* under the existing laws, which were to regulate them? Is not that section confined expressly to proceedings "which by the existing laws would be valid?" Do not all other proceedings come under the appellate jurisdiction conferred upon this court, and made by the first section to commence and take effect from the first day of July, 1854? Again, the language of the second section is not that prosecutions, &c., commenced before the first day of September, shall be, but *may* be prosecuted to their conclusion, &c. The language is permissive not imperative.

But, abandoning the narrow field of mere verbal criticism, and admitting that the language of the second section, taken alone, is not impressed with that stamp of indisputable clearness, beyond the reach of cavil or quibble, which the vast importance of the subject demanded, and which might have been expected from minds so acute as well as enlarged, as are those from which it emanated, let us look to the general objects of the Code, and the Legislature, and to all the sections and provisions bearing on the point under discussion, taking them together, and giving effect if possible to all. In the first place, among other provisions of the Code, appellate jurisdiction in cases of felony, is conferred on this court. In the second place, by the first section of the preliminary act, the Code is made to regulate the proceedings in all prosecutions, "*in all the courts*" of the Commonwealth, from and after the first day of July, 1854. From this date then, by that section, the appellate jurisdiction is made to begin, and to regulate the proceedings *in all prosecutions*, &c., without reference to the date of their commencement. Can this jurisdiction, thus conferred, be interrupted, suspended, or taken away, by any implication, construction, or intendment, unless such purpose be clearly expressed? The second section fixes

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another date, the first day of September, two months after the Code is to take effect and become law under the first section, and declares that the proceedings commenced before that time, which would be valid under the existing laws, had the Code not passed, should not be rendered invalid by the Code. Is it possible to suppose that the true intention was to suspend the entire Code from the first day of July till the first day of September—was it to repeal the first section? In what condition does the argument of the Attorney General leave the first section? Had a prosecution commenced between the first of July, the date fixed for the Code to take effect, and the first of September? Are all the provisions of the Code inapplicable to such a case? Will the appellate jurisdiction not reach errors committed in such a case, errors expressly noted in the code itself as giving jurisdiction; for instance, “an error in allowing or disallowing a peremptory challenge,” an error which by the second section itself, would invalidate the proceedings, being contrary to the laws existing at the time, &c.? Such a construction would nullify the first section altogether. When we show that the appellate jurisdiction existed at the time of this trial, that it commenced on the first of July, 1854, that it was expressly extended to all prosecutions without reference to the date of their commencement, that it is no where expressly suspended in any case, that the error complained of is expressly provided for in the body of the Code, that it is clearly an error under the section providing for the prosecution of cases previously commenced under the laws existing at the time of their commencement, we have placed that construction which makes an error, and by intendment or implication, takes away the power of correcting it judicially; a power expressly given elsewhere, and specifically for the very purpose among others of correcting errors of this precise stamp; we have placed that construction, we think, in that predicament which logicians call a “*reductio ad absurdum*.” If we are

correct, the second section leaves the appellate jurisdiction of this court as the first section left it. It intended principally to guard proceedings previously begun from the *ex post facto* operation of the Code, and subordinately to permit prosecutions instituted and in progress after the first of July, 1854, and before the first of September, when the Code perhaps might not have had sufficient publication and notoriety to have reached all the courts in the Commonwealth; but most certainly never intending to take away from this court a power so necessary to the execution of that very section which declares the proceedings here complained of invalid—the appellate power—without which the proceeding declared and admitted to be invalid by the Code itself, becomes practically valid, and must be enforced in violation of the laws existing at the time of the commencement of the prosecution, and also of the provisions of the second section of the preliminary act, framed by the Legislature to guard the citizen from this very injustice. A strange anomaly in jurisprudence. Not “*a casus omissus*,” but a case provided, by which a wrong, an illegal, unconstitutional wrong, a wrong against statute and organic law, provided against by Code and Constitution, is left without judicial remedy. It cannot be. The construction must be false.

Judge SUMNER delivered the opinion of the Court.

At the July term, 1852, of the Franklin Circuit Court, the appellant was indicted for the murder of Jephtha Montgomery. The prosecution having been transmitted to the Anderson Circuit Court, by change of venue, a trial was there had at the last April term of that court, when he was convicted of voluntary manslaughter, and sentenced to confinement in the penitentiary for the period of two years. June 29.

The prisoner has appealed to this court, and the matters relied upon to reverse the judgment, are :

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1. That the court improperly admitted the dying declarations of Jephtha Montgomery to be given in evidence against the prisoner.

2. The court erred in not arresting the judgment.

3. The court erred in allowing the Commonwealth the right of peremptory challenge.

4. The court ought to have granted a new trial for the reasons assigned in the record.

1. The dying declarations of a person who is wounded, is clearly admissible evidence against a person charged with homicide according to the English Common Law, and is not changed by our laws. (*Greenleaf on Ev.*, 186.)

1. The English authorities fully establish as a principle of the common law the admissibility of dying declarations as evidence; but it seems to be well settled that they are admissible as such, only in cases of homicide, "where the death of the deceased is the subject of the charge, and the circumstances of the death are the subject of the dying declarations." The principle upon which they are admitted, rests upon the ground of public necessity to preserve the lives of the community, by bringing the manslayer to justice. (*Greenleaf on Evidence*, 186.)

The argument against their admissibility is, that they form a very dangerous description of testimony, made frequently under feelings of revenge, calculated to affect the truth and accuracy of the statements, and that the rule which admits them, not only deprives the accused of the right of *cross-examination*, but also of the constitutional right "to meet the witnesses face to face," that are produced against him.

2. But to render dying declarations admissible, they must be made in *extremis*, under a solemn sense of impending dissolution. In such a situation every motive to falsehood is presumed to be silenced and every motive to truth in lively exercise. Its credibility is, however, to be decided by the jury.

The answer to the objection made to the policy of the rule is that such evidence must, from the necessity of the case, be admitted to identify the accused, and to establish the circumstances from which the death resulted; otherwise, the guilty would frequently escape, where no third person witnessed the transaction, for the want of testimony to designate the perpetrators of the homicide, and to explain the manner in which it occurred. And as these declarations, to be admissible, must be made in *extremis*, under a solemn sense of impending dissolution, it is considered that the constant expectation of immediate death will

science every motive to falsehood, remove every feeling of revenge, and the mind will be induced by the most powerful considerations to adhere strictly to the truth; the awful situation of the individual creating, in legal contemplation, an obligation equal to that which is imposed by an oath administered in a court of justice. Besides, after the evidence is admitted, its credibility is entirely within the province of the jury, who have a right to consider all the circumstances under which the declarations were made, and to give the testimony such credit only as upon the whole they may think it deserves.

The constitutional right of the accused to confront the witnesses against him is not impaired by this rule of evidence. The person who testifies to the dying declarations is the witness against the accused; and it is only by failing to discriminate between the witness and the testimony which he gives that the constitutional objection assumes the appearance of plausibility. The Constitution does not alter the rules of evidence, or determine what shall be admissible testimony against the prisoner, but it only secures to him the right to confront the witnesses who may be introduced to prove such matters as, according to the settled principles of law, are evidence against him. This objection, if carried out fully, would result in the rejection of all declarations, even where they constitute part of the *res gestæ*. The law determines the admissibility of testimony—the Constitution secures to the accused the right to meet the witness who deposes face to face. But what the witness, when thus confronted, shall be allowed to state as evidence, the Constitution does not undertake to prescribe, but leaves it to be regulated by the general principles of the law of evidence. When the declarations of the deceased are offered to the jury, they constitute facts in legal contemplation, which tend to establish the truth of the matter to which they relate. The position, therefore, that their admission as evidence infringes upon the constitutional right of the

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3. The rule of law admitting dying declarations to be given in evidence against the accused in trials for homicide, is not changed by any Constitutional provision of Kentucky.—The Constitution does not change the rules of evidence which existed at its adoption, but only secures to the accused the right to confront the witnesses who may be introduced against him to prove such matters as were, according to the settled principles of law, evidence against him. The law determines the admissibility of testimony. The Constitution secures to the accused the right to confront the witness who details that testimony, face to face. (*Wood v. the State* Miss. Howard's

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Rep., 655; *Anthony vs the State*
1 *Meigs*, 265.)

prisoner to confront the witnesses against him, is wholly without foundation, and cannot be maintained.

This constitutional provision has received a similar interpretation in the courts of other States, where it has been decided that it does not abrogate the common law principle, that the declarations in *extremis* of the murdered person, in such cases, are admissible in evidence. (*Woodsides vs. the State*, 2 *How. Miss. Rep.* 655; *Anthony vs. the State*, 1 *Meigs* 265.)

The Circuit Court, therefore, did not err in the admission of this testimony.

4. The only grounds upon which a judgment can be arrested in a criminal case, is that the facts stated in the indictment do not constitute a public offense within the jurisdiction of the Court.—(*Criminal Code*, sec. 270.)

2. The matters relied upon in the arrest of judgment were not such as a motion for that purpose can be based upon. It is expressly provided by the criminal code, (sec. 270.) that the only ground upon which a judgment shall be arrested, is that the facts stated in the indictment do not constitute a public offense within the jurisdiction of the court. No such cause is alleged to exist in this case, and if such an objection had been relied upon, it would have been wholly without foundation.

3. In considering the right of the Commonwealth to challenge any of the jurors peremptorily, it becomes necessary to decide whether the prosecution in this case, inasmuch as it was pending at the time the Criminal Code was adopted, should be regulated by the provisions of the Code, or by the previous law.

The preliminary provisions contained in the Code, which were intended to fix and determine this matter, are not so clear and explicit as might be desired. They are in the following language:

Sec. 1. "That the provisions of this act shall regulate the proceedings in all prosecutions and penal actions, in all the courts of this Commonwealth, from and after the first day of July, 1854, and shall be known as the Code of Practice in Criminal Cases."

Sec. 2. "That all prosecutions or proceedings in

criminal or penal cases, which shall be commenced before the first day of September, 1854, and which, by the existing laws, would be valid, shall not be rendered invalid by this act, but may be prosecuted to their conclusion, and enforced according to the existing laws, as if this act had not been passed."

No express reference is made in this last section to such prosecutions as were then pending, but they must be regarded as embraced by its provisions, notwithstanding the language used in it seems more properly to apply to such prosecutions as should be subsequently commenced, inasmuch as every reason which would require such an enactment for the benefit of the latter would apply to the former with equal or greater force. Besides the language used is sufficiently comprehensive to embrace all prosecutions that should be commenced at any time before the first day of September, 1854, and we have no doubt the Legislature intended that the provisions of this section should apply to all such prosecutions whether they were commenced before or after the act took effect.

The first one of the foregoing two sections declares expressly that the provisions of the Code shall regulate the proceedings in all prosecutions and penal actions in all the courts of this Commonwealth, from and after the first day of July, 1854. The language is broad and comprehensive; it embraces all prosecutions and all courts. Had it stood alone, no criminal proceeding after the time mentioned could have been regularly carried on, unless it conformed to the provisions of the Code. To guard against any difficulty or inconvenience that might have resulted, if this requisition had remained imperative, in consequence of the ignorance in some portions of the State of the existence of the Code, and the nature of its provisions—the second section provided that all proceedings in criminal cases, commenced before the period named therein, might be prosecuted to their conclusion according to the existing laws, and should

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5. The Criminal Code giving the right of peremptory challenge to the Commonwealth in criminal cases applies as well to trials in prosecutions commenced before, as to those commenced after the first day of September, 1854. (*Criminal Code*, sec. 1, 2 and 23, chap. 21, page 191.) This is not an *ex post facto* law. (*Calder, et al. vs. Bull, et al.* 3 Dallas, 386; 12 Wheaton, 486; 3 Gratton, 632.) The words *ex post facto* relate

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to crimes, and
not to criminal
proceedings.

not be thereby rendered invalid. The right to proceed in such cases, under the previous law, is merely permissive; it is not however exclusive, it does not conflict with the right to apply the provisions of the Code to such proceedings. If prosecuted according to the previous law, they shall not be rendered invalid by the act, although it expressly applies to them, and they may be regulated by its provisions. Such proceedings then may be prosecuted, either under the Criminal Code, or under the previous law, as the court may direct.

This construction of the act is fortified by the consideration that according to its terms it expressly applies to all prosecutions, without regard to the time the offense was committed. Previous offenses are not excluded from its operation, nor is any reference made to the time when the offense was committed. When, therefore, the law evidently embraces offenses theretofore committed, why should it be supposed that the Legislature considered the time when the prosecution was commenced of so much importance as to exempt from the operation of the act such as were commenced before its passage? It would be unreasonable to attribute to the Legislature an intention to attach more importance to the time the prosecution was commenced than to the time the offense was committed. If the Code is to apply to all offenses without reference to the time they were committed, why should it not equally apply to all prosecutions without reference to the time they were commenced? No substantial reason can be assigned, unless it be that its existence might be unknown, and consequently it might be necessary to provide that if prosecutions were commenced and carried on under the previous law, they should not thereby be rendered invalid. To this extent only was it deemed necessary to exempt such prosecutions from the operation of the act.

This construction of the act seems also to be required by the 23d sec. of the 21st chap. of the Revised

Statutes, page 191, which expressly provides that although a new law shall not be so construed as to affect any right accrued, or claim arising before it takes effect, yet that the proceedings thereafter had shall conform, as far as practicable, to the laws in force at the time of such proceedings.

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The Criminal Code was the law in force when the appellant was tried and convicted. The prosecution against him, although commenced before it took effect, was expressly embraced by its provisions, and the statutory rule of construction, to which we have adverted, demanded that the proceedings thereafter had should conform, as far as practicable, to the law in force at the time of such proceedings. The inevitable conclusion then is, that the prosecution in this case might properly have been regulated by, and carried on under the provisions of the Code.

But it is contended that so much of the Criminal Code as gives to the Commonwealth the right of peremptory challenge, a right which did not previously exist, is to that extent, if applied to pending prosecutions for offenses previously committed, an *ex post facto* law, and therefore unconstitutional.

The Constitution of the United States, as well as that of this State, forbids the Legislature of any State to pass *ex post facto* laws. The Supreme Court of the United States, in the case of *Calder and ux. vs. Bull and ux.*, 3 Dallas, 386, has given an exposition of the clause in the Constitution of the United States which contains this prohibition; and Judge Chase mentions four kinds of laws which, in his opinion, would be embraced by it.

1. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal, and punishes such action.
2. Every law that *aggravates a crime*, or makes it *greater* than it was when committed.
3. Every law that *changes the punishment*, and inflicts a greater *punishment* than the law annexed to the crime when committed.

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4. Every law that alters the *legal* rules of *evidence*, and receives less or different testimony than the law required, at the time of the commission of the offense, *in order to convict* the offender.

The same Judge says that he does not consider any law *ex post facto* but those only that *create or aggravate* the crime, or increase the punishment, or change the rules of evidence *for the purpose of conviction*.

We have not been referred to any authority by which this constitutional prohibition has been extended beyond the limits thus prescribed; nor any that has considered it as applicable to laws merely regulating criminal proceedings, or the mode of trial in criminal cases.

In what manner is the prisoner affected by the exercise of the right of peremptory challenge, on the part of the Commonwealth? It does not divest him of any right; although it may in its operation exclude from the panel some individual that he might desire to have upon the jury. It does not interfere with his right of peremptory challenge. An *impartial* jury is all that he is entitled to under the Constitution. It has no tendency to deprive him of this right. He cannot claim the right to be tried by a *partial* jury—one that may be inclined to favor his escape from justice. He has no right to select a jury, although the law permits him, to a limited extent, to reject such persons as he is unwilling to be tried by.

In the case of the *United States vs. Marchant and Colson*, 12 *Wheaton's Reports*, 480, the Supreme Court decided, that where two or more persons are jointly charged in the same indictment with a capital offense, they have no right to demand a separate trial. The claim to a separate trial was based upon the ground that they had a right to select a jury out of the whole panel, and that as upon a joint trial, one might desire to retain a juror who was challenged by the other, this right of selection was, upon such a trial, virtually impaired; but the court decided that the right of peremptory challenge was not a

right to select, but a right to reject jurors. It enabled the prisoner to say who should not try him, but not to say who should be the particular jurors to try him. It gave him the privilege of exclusion, but not of selection.

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And the Supreme Court of Virginia, in the case of *Pary vs. Commonwealth*, 3 *Gratton's Rep.* 632, decided that an act of the Legislature which directed that thereafter in all prosecutions for offenses punishable by death or confinement in the penitentiary, the *venire jacias* should command the sheriff or other officer charged with its execution, to summon twenty-four freeholders of his bailwick, residing remote from the place where the offense was supposed to have been committed, prescribed a new mode of selecting a jury, and reduced the number of peremptory challenges on the part of the prisoner, was not unconstitutional, although the act embraced prosecutions pending at the time of its passage.

The court in this last case held that the words *ex post facto*, used in the Constitution, relate to crimes, and not to criminal proceedings; and that lessening the number of peremptory challenges did not deprive the prisoner of the right of being tried by the same law and the same rules of evidence that were in force at the time the offense was committed; and therefore the law was not unconstitutional.

If then a law that diminishes the number of peremptory challenges, to which the prisoner was previously entitled, is not an *ex post facto* law, it will hardly be contended that a law which declares that the Commonwealth shall be entitled to five peremptory challenges in prosecutions for felony, is of that character, and therefore unconstitutional. Confering the latter privilege is evidently less disadvantageous to the prisoner than the deprivation of the former. It is a privilege too that leaves him the full exercise of his right to exclude from the jury such persons as may be objectionable to him.

Considering the nature and object of the prisoner's

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right of peremptory challenge, as well as the object and effect of the law in conferring a similar right (to a limited extent) upon the Commonwealth, it seems to us that the legitimate exercise of the former is not in any degree affected or impaired by the exercise of the latter; and that the only effect or tendency of the exercise of the latter right is to procure an impartial jury to pass upon the guilt or innocence of the prisoner. Our conclusion then is, that the section of the Criminal Code which allows to the Commonwealth five peremptory challenges in prosecutions for felony, pending at the time of its passage, is not an *ex post facto* law, nor otherwise unconstitutional.

The court therefore did not err in permitting the Commonwealth to exercise the right of peremptory challenge.

4. The error of the Circuit Court, if one was committed by it, in overruling the motion for a new trial, is not one of the errors for which, according to the 334th section of the Criminal Code, a judgment of conviction can be reversed. Upon a motion of this kind the action of the Circuit Court is final.

There does not, therefore, appear to be any error on the record to the prejudice of the appellant, which will authorize a reversal of the judgment against him. And we would here remark that if the case was not embraced by the Criminal Code, and the proceedings therein should have been governed by the previous law, then, as this court had no appellate jurisdiction in such a case, under that law, the appeal could not have been maintained, nor the judgment been reversed by this court.

Wherefore, the judgment of the Circuit Court is affirmed.

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APPEAL FROM KENTON CIRCUIT.

Case 6.

1. The equity of redemption in lands which may descend to heirs, is liable to sale under execution, upon judgments against the heirs, for the debts of the ancestor.
2. It is not necessary, to render the sale of an equity of redemption valid, that the sheriff should specifically set forth in his levy and sale, the amount of the mortgage liens upon the land.
3. That an execution omitted to issue for interest, when interest was given, held not a sufficient ground to invalidate a sale made under it, when there was no suggestion that there was any other judgment between the parties.
4. A sheriff having two executions in behalf of the same plaintiff, and against the same defendant, returns on each execution the sale of the same lands. Held, that whether he in fact made two sales or one only there was no irregularity of which the defendants in the execution could complain.
5. The pendency of a suit to foreclose a mortgage upon land presents no obstacle to the sale under execution of the equity of redemption, in behalf of another creditor.

The facts of the case are stated in the opinion of the Court. *Rep.*

Fox and French, for appellants:

The first question arising in the case is whether by any law of Kentucky an equity of redemption which has descended from an ancestor to his children can be levied upon and sold, upon an execution issued on a judgment at law against the heirs?

It cannot be pretended that an equity of redemption can be sold on execution, by any common law rule or proceeding. (1 *Powell on Mortg.* 254; 1 *Ohio Rep.* 314, 318.) If it can be sold at all on execution, a statute of the State must be found authorising the sale on such execution obtained against the heir. In 1 *Dana*, 24, *Cooper vs. Martin*, and 1 *Dana*, 187, *Buck vs. Sanders*, it was held the interest of a mortgagee could not be sold on execution.

The act of 12th February, 1828, relating to executions, it is claimed by defendants in error, authorises the sale in the present instance. This we deny.

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The 36th sec. of that act, provides that when real estate is held or covered by mortgage, deed of trust, or other incumbrance, all the right and interest, legal or equitable, which the *mortgagor or grantor has in said estate*, shall be subject to be levied upon and sold by execution in the same manner as such property might have been sold if no such incumbrance had existed, and the purchaser shall take it subject to such incumbrance, and may pay off and discharge such incumbrance, &c.

This certainly does not authorize any equity of redemption to be sold, except where the execution is against the mortgagor, for it is to be levied upon the title which the mortgagor *has* in said estate. It cannot be pretended that after the mortgagor has sold or conveyed his equity of redemption, the same could be levied upon, on an execution issued against him. (2 *Dana*, 204; 8 *Ib.*, 198.)

There is no provision made in this statute for levying upon an equity of redemption, unless it is while the same is in the hands of the grantor or mortgagor; it is only the right which such *mortgagor has* (that is, at the time the execution is in the sheriff's possession) which can be levied upon; such we conceive to be the fair construction of the statute.

We claim that at the time the execution came into the hands of the sheriff, Abraham P. Howell had no right nor title in the property. Whatever right he had was, by law, on his death vested in his heirs; he was as far from being the owner as though he had sold and conveyed it to others. Again, the execution was not against him, hence it could not be levied upon his equity if he had any.

The Legislature of Kentucky has not altered the common law principle, that an equity of redemption cannot be sold on execution except in the single case of a judgment obtained against the mortgagor, and where execution is issued and levied while the mortgagor *remains the owner*. After the estate becomes vested in others, whether by a sale by the

mortgagor, or by the act of law, as by descent, it cannot be levied upon on execution.

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By the statute law of Kentucky, it is declared that when a man dies his whole real estate shall pass to his children; the equity, therefore, was in the heirs.

It is claimed, however, by the defendants in error, that because the estate descended to these children, it was subject to be sold on execution, in the same manner, on a judgment obtained against them, as it would have been on a judgment against their ancestor.

But the statute has not said so, and we know that land in some countries may be subject to be levied on for an ancestor's debts while living, which could not be levied on at all after his death. What portion of an ancestor's debts his heirs shall pay out of real estate, depends altogether upon legislation, or custom which is supposed to be founded on lost statutes. In England the heir was only bound to pay specialty debts, not simply contracts. But even debts which he was bound to pay could not be collected by sale on execution, unless a statute authorised the land to be sold. So in Kentucky, there is no lien on the land for the debts of the ancestor, and if the heir or devisee sells the land descended or devised, the title of the purchaser is not affected by a subsequent judgment against the heirs or devisees. (1 *Morehead and Brown Stat.* 742.)

These considerations all show that after the death of a man his estate vests absolutely in the heirs. The ownership has changed. It ceases to be the right or title of the mortgagor to redeem, because the right to redemption has by law vested in another.

Now the statute does not provide that all equities of redemption may be sold on execution, but only that interest which the mortgagor or grantor *has* (in the present tense) in the estate. It makes no provision for the sale of an equity of redemption except while it remains in the hands of the mortgagor. The

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statute might have subjected the right to sale, when descended to the heir, but it has not done so, and the court can only enforce the law as it is. The court cannot extend it beyond the language of the act.

We therefore claim that the proceedings had under the Sloop judgment, did not divest the heirs of their title, because no provision has ever been made by the Kentucky statutes for the sale of an equity of redemption, except while it remain in the original mortgagor. The statute extends no further, and this court will not aid it by any *equitable* construction, because at law the equities of the parties cannot be considered.

Hence it has been decided the right to sell an equity of redemption on execution being a statute remedy, does not extend to a distress. (2 *Dana*, 204, *Snyder vs. Hill*.)

So it has been decided that the *mortgagee* under this statute, cannot by obtaining a judgment at law, sell the equity of redemption of his mortgagor. (7 *Dana*, 68, *Goring's Ex'rs. vs. Shreve*.)

In the next place there is no reason why the court should aid by construction an execution creditor, because the party had a full and sufficient remedy in equity to subject all the equities of defendants to the payment of any judgment against them.

On the filing of a bill in chancery for the sale of an equity of redemption, the chancellor would have ascertained what mortgages were in existence, and the amounts due on each. By such a proceeding all parties would have known what interest was actually offered for sale.

While the right to sell an equity of redemption is confined to a judgment against the mortgagor, while he is living, he being cognizant of the amount due on the incumbrance, there is not much danger of a sacrifice of property. But to extend the right of sale as against the heirs, who cannot be supposed to know what is due, is certainly going beyond the letter of the statute, and, we think, beyond the true meaning

and spirit of the law. We think the Legislature would pause before authorizing a sale on execution under such circumstances.

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But if the court shall be of opinion, that the statute does authorize a sale of the equity of redemption of the heirs of a mortgagor, on a judgment against them in ordinary cases, we claim that, under the facts shown in this case, no such right existed, and that the sale is void for other reasons which we will now urge :

1. At the time this judgment was had, and for years before, a bill and cross bills had been pending for the foreclosure of the mortgages existing on this estate, and as early as October, 1845, more than three months before the sale on the execution, the whole of this property had been decreed to be sold under these mortgages.

We claim that while these bills were pending, and particularly after an actual decree for the sale, no sale of the equity of redemption could be made. (5 *Dana*, 280.)

From the time of commencing the foreclosure suit, but certainly from the time the decree for sale was entered, this equity of redemption ought to be considered as in the custody of the court having control of those suits, and not subject to the execution process. This is in analogy to all other proceedings *in rem*. If this view is correct the proceedings must be deemed void.

2. We claim, if an equity of redemption can be sold, several equities of redemption of several mortgages cannot be sold at the same time upon one execution.

If we refer to the language of the statute, we shall find the right is to be sold *subject to the incumbrance*, not "incumbrances" (in the plural.)

It might be right and proper, where there was but one incumbrance to permit the equity to redeem that claim, to be sold, because it would be a simple proceeding, but where the right to redeem a multitude

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of mortgages is sought to be sold, the statute ought expressly to authorize it In 1 *Pick.*, 355, it is so held.

And such, we take to have been the opinion of this court in *Lee & Co. vs. Fellows & Co.*, 10 *Ben. Monroe*, 119, where the court treated a Sheriff's sale on execution of an equity to redeem land, and an equity to redeem negroes, in gross, as a nullity.

3. The sale is void, because no mortgage is referred to or identified by the levy or sale. If such sales are allowed, the court ought to protect the judgment debtor, by at least requiring that the particular mortgage or mortgages, the equity to redeem which is sold, should be so referred to, as to enable purchasers to examine the record, so as to ascertain the amount for which the property has been mortgaged. To permit any man to seize an equity of redemption, and to sell it on execution without any mention of, or reference to the mortgage intended to be redeemed, is contrary to public policy, and to all analogous cases. If the object of the Legislature was to enable a judgment creditor to sell on execution an equity, it surely cannot be claimed that the Legislature intended the Sheriff might, under the direction of the plaintiff, make so indefinite a levy that nobody could understand what was intended to be sold. A court of equity would have decreed the sale of the equity of the particular mortgages found to be existing; and the least that could be required of the plaintiff in execution, or the sheriff who is the plaintiff's agent, would be the *naming of the mortgage or mortgages* the right to redeem which is intended to be sold. To require the naming of the mortgagee is no hardship upon the plaintiff or the sheriff, for if it is known there is a right of redemption, the name of the mortgagee is also known, and to require the plaintiff to name the mortgagee, so as to give every person an opportunity of ascertaining what is due on the mortgage, and the value of the thing to

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be sold, would appear not unreasonable. To dispense with such a requirement, is to induce plaintiffs to sacrifice the interest of the judgment debtor, by withholding from the public a knowledge of the value of the thing to be sold, and thus enabling the plaintiff to buy his debtor's property for a song. In the language of this court, in *Goring Ex'rs vs. Shreve*, "such a trap for the sacrifice of estates, under execution, never in our judgment entered into the mind of the Legislature, nor will we give to their enactment, such a mischievous construction." (7 *Dana*, 71.) And in 10 *Dana*, 119, the court, as we have seen, treated a gross sale of an equity to redeem land and negroes as a mere nullity, as an attempt to commit a fraud upon the statute.

If we look at the practice in other States, where the equity of redemption is allowed to be sold on execution, we shall find that it is the usual course to name the mortgage, the equity of redemption in which is attempted to be sold, the amount for which it was given, and to describe the property embraced in the mortgage. (4 *Pickering*, 279; 1 *Vermont*, 131; 5 *Vermont*, 243; 22 *Vermont*, 141.)

And it is held, that where the description of the amount of the mortgage is less than the real amount, it will not prejudice the sale, but where the amount of the mortgage is described as larger than it really is, it is strongly intimated that it would render the sale void, as conveying untrue intimations to purchasers or bidders, to the defendants' prejudice. (*Paine vs. Webster*, 1 *Vermont*, 131; *Straum vs. Cailin*, 22 *Vermont*, 141.)

But the universal practice of describing the mortgage property, and of setting forth the date of the mortgage, and amount of money secured by the mortgage, shows the propriety of what we are contending for, and also shows, that when the Legislature of Kentucky, adopted the statutory regulation of selling an equity of redemption from other States, they intended to protect the rights of debtors, by re-

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quiring creditors and officers to so describe the property levied on, and the character and extent of the right sold, as to produce a fair competition. We claim, therefore, that in this view, the levy is void for uncertainty in the description of the thing to be sold, in the same manner that a levy and sheriff's sale of the fee simple is void when the description is so uncertain, that the identity of the thing sold cannot be ascertained.

4. We claim the sale is void, because the levy is uncertain in not designating, by a proper description, the land sold.

It is well settled that the description of land levied upon by execution, must be so certain and specific, that a party desiring to purchase, can, with reasonable diligence, ascertain with precision the property intended to be sold; without this, the defendant is at the mercy of the creditor. The competition at the sale, intended to be secured to the defendant, is entirely destroyed, and the plaintiff thus secures to himself the complete monopoly of bidding at the Sheriff's sale.

Description of land in a levy and sale as "the defendants' lots at Nahunta depot," is too vague and uncertain, and therefore the deed passes nothing. (*Edmundson vs. Hooks*, 11 *Ired. Law Rep.* 376.)

A levy in execution should describe the property levied on, with such certainty as will enable any one to know the property taken in execution. A levy on one half of a lot, without designating which half, is void. (4 *McLean*, 329.)

A levy on 500 acres of land, to be taken off the most northerly side of the widow's dower, was held invalid. (5 *J. J. Marshall*, 15.)

The Sheriff ought to go upon the premises, and make an actual levy; or should see the defendant in the execution, or his agent, and obtain his consent that the execution be levied upon the estate sought to be subjected; or should see and apprise the defendant or his agent of the particular estate upon which he

designs levying, and should thereupon make an official and specific entry upon the execution, or upon a paper attached thereto, descriptive of the estate and levy. In the two first modes, it would be the duty of the officer to make the entry upon the execution. (8 *B. Monroe*, 304.)

"Levied" is not a valid levy. (8 *Monroe*, 302.) A levy on the tract, or estate, or right, title and interest of Owings, in the tract of 2,908 acres which was patented to George Nicholas and conveyed to T. D. Owings, being the tract including the town of Owingsburgh, was held bad.

It is the duty of the officer levying an execution to designate so far as may be the nature of the interest to be sold, and if there are several parcels of the same debtor which might as to their extent be described by one boundary, still if there be a substantial difference in the interest which he has in each, as if he be mortgagee of one tract, tenant in common of another, and tenant for life of the third, it is the duty of the officer to make the discrimination, and not by sale *en masse* sacrifice the whole, (7 *B. Monroe*, 689.)

A levy was made on a tract of 600 acres in the county of Oldham. The Marshal returned that Lawrence Young undertook and agreed to pay off the whole amount of all the executions, for 190 acres of said land, and no person offering to pay more, it was struck off, &c. It was held the sale was void, because it did not distinguish the part sold: the statute law providing, "lastly to sell the lands, tenements and hereditaments in possession, reversion or remainder, or so much thereof, in one or more entire parcels, as shall be sufficient, and such parts as the owner shall direct, if he thinks proper." (*Act of 1798, Litt. & Swigert's Dig.* 513-14.)

Now the description of the levy in this case, is only that the Sheriff levies on "the equity of the redemption of the said heirs of Howell, deceased, in and to about 375 acres of land near Covington, on

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the waters of Willow Run, the late residence of said Howell, and now of said heirs, and particularly described in various deeds to said Howell from the heirs of William Martin and others."

This contains no description of the property, and the reference to deeds from Martin and *others* is wholly uncertain, because to whom the word *others* was intended to refer, cannot be ascertained from the paper.

And at the time of the levy, the heirs had the right to redeem these equities. Can the court say which of these equities was sold?

5. Again, we insist this levy and sale is void, because it does not appear that the Sheriff was ever on the land said to be levied upon, or that he made known to any of the defendants his intention to levy upon the land in question. These facts should appear in evidence on the trial, where the title set up depends upon a Sheriff's sale, as was held by this court in *McBurnie vs. Overstreet*, 8 Ben. Monroe, 304.

Now, in the case before the court, there is no evidence of any levy having been made, except what appears on the execution, and it does not appear, from the return, that the Sheriff was ever on the land, or that any of the parties were called upon, or that any intimation was given to any of the parties, that the Sheriff had levied, or intended to levy on the land, or on the equity of redemption, and therefore, under the above decision, which was in an ejectment cause, the levy in this case ought to be held void.

6. In the next place, the statute requires the purchaser to execute a bond to the Sheriff, that he will not sell the property in twelve months. No such bond was given, and we claim that in consequence of this, the sale was void.

The whole case shows that a great sacrifice of the defendants' property was made, that the plaintiff in the execution was the purchaser, and made a large

speculation by the unfair proceedings referred to, which he could not have done, had he made the levy in such a manner as fairness and justice required. Such a purchaser is not entitled to any sympathy. He is treated very differently from a purchaser who is a total stranger to the proceedings. He is bound to show that everything is fair and correct, or his proceedings will be held void.

We submit then, that the Judge below erred in the particulars pointed out in the record, and that the judgment out to be reversed.

Morehead and Brown, on the same side—

On the 23d June, 1845, the Sheriff of Kenton county, having in his hands two executions in behalf of Hiram Sloop *vs.* the Administrator and heirs of A. P. Howell, one for the sum of \$4,329 56 and costs, the other for the sum of \$1,437 62 and costs, levied the same upon the equity of redemption of the heirs of Howell, in a tract of about 375 acres of land, in Kenton county, near Covington. The judgment under which it is alleged the execution issued for the larger amount does not bear interest; the smaller judgment is for interest, but neither execution calls for interest.

On the 19th January, 1846, the Sheriff returns that he sold, on that day, the equity of redemption of the heirs of Howell for \$2,777 73, and under the smaller execution for the sum of \$922 27. He does not seem to have sold for a gross sum under both executions, and divided the proceeds ratably. In section eight of the execution law of 1828, (*Stat. Law*, 636-7) it is provided "that where two or more writs against the same person shall come to hand at the same time, the Sheriff or other officer shall proceed to levy and sell in virtue of all;" and if the proceeds of the sale do not pay all their shall be a *pro rata* distribution of the proceeds of sale. The law, it will be readily perceived, was not complied with.

The deed to the purchaser recites a levy upon about

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370 acres. The deed recites that the land was sold under both executions at the same time and place. But there seem to have been separate and distinct sales. If the entire equity was sold under one execution, the heirs might have redeemed within the year by paying the amount of the sale. If there were two legal sales, it must have been of two separate parts of the equity, but what this was is not shown, and the heirs could not redeem either one. In the case of *Addison, &c. vs. Crow*, 5 Dana, 280, this court said that a sale of an equity of redemption, when a suit is pending for the foreclosure of the mortgage, is "inoperative and void." The other points have been sufficiently elaborated.

J. W. Stevenson, on the same side—

1. We maintain there is no judgment to support either execution.

The judgment first relied on is for \$4,329 56, with interest from 26th April, 1848.

The execution purports to issue on a judgment for \$4,327 56, *without interest*.

It will hardly be contended that a judgment, bearing interest is or can possibly in a case like this, be the same as one without interest. They are totally distinct, and for entire different amounts.

It is not, as the learned counsel supposes, a clerical mistake in copying. The objection was taken in the court below, and the difference pointed out. For a clerical misprision of the Clerk in issuing the execution originally, it is too late to ask for a correction. The same objection applies to the second execution. The second judgment bore interest—which does not sustain or authorize the second execution, as issued.

2. We maintain that the description in this levy is void, for uncertainty in not setting out the several mortgages. There were four mortgages executed by Howell—it is not pretended that these equities were not separate and distinct as to value and amount.

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Unless a purchaser knew what the mortgages were, and their amounts, he would always be deterred from bidding, while an administrator or infant heirs would never have been enabled to know what they were to redeem.

3. The sale was palpably void, because the statute of 1828 did not authorize or subject the interest or equity of redemption of the heirs to execution.

It is admitted that they are not included by the words of the statute. The Legislative intent, to have included his heirs under the words "*interest of the mortgagor*," *must be made apparent*. We admit it is the duty of the court to carry out the Legislative intent, and in arriving at it, the context, subject matter, the effects and consequences, and reason and spirit of the law should be called in to aid in ascertaining this intent.

The words of the statute, in not including "the heirs," is *prima facie* evidence that the Legislature did not intend to include them. The reason for their exclusion rests upon the most benign and enlightened principles of legislation.

The Legislature evidently intended that the interest of infant heirs should not be sacrificed, by subjecting their equitable interest in mortgaged property to execution sales.

It has long been held that the mortgagor cannot, by a judgment at law and on an execution issuing thereon, levy the same on the mortgagor's equity of redemption to the mortgaged premises. (7 *Dana*, 64; *Ib.* 220.) The reason of this is, that having already a mortgage lien on the debtor's property, he might purchase it in, extinguish the incumbrance, and thus defeat the very object of the statute, which requires and intended to effectuate the design of making the purchaser hold subject to the statute. So it has been held, that a creditor whose debt has been named in the mortgage, shall not be permitted to assert his execution lien against the mortgaged premises, although he is not the mortgagor and his debt had been

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included in the mortgage without his knowledge or consent. In discussing this very question this court says: "And although it be true that this construction may throw the creditor into a court of equity, because his debtor, without consulting him, has made a mortgage which secures his debt; this is no more than the debtor could have done before the enactment of the statute. And he is left in that condition, not as a consequence of anything he has done, but because the statute, upon a fair construction, does not apply to his case; *and because, if the statute could be construed otherwise, and if it should be supposed that, not having voluntarily taken a mortgage, he is entitled to a favorable construction of it, we say THAT THE EVILS WHICH MUST FOLLOW FROM AN EXTENSION OF IT TO HIS CASE, GREATLY OUTWEIGH THE PARTIAL INCONVENIENCE WHICH HE MAY SUSTAIN FROM NOT BEING EMBRACED WITHIN IT.*" (*Bronston vs. Robinson*, 4 Ben. Monroe, 144.)

This case, and those referred to, establish the fact, that there are exceptions contemplated by the spirit of this statute, and that this court is not disposed to extend to an inconvenient and dangerous extent the operation of this statute. Could a stronger case be presented than the case at bar, for an exemplification of the safety and conservative reasoning of the court, in their unwillingness to extend beyond the express words of this statute its necessary operation? Here is an old man suddenly swept from the world, away from home, with a large family and many of them infants, with a large estate which, with a little time, would have been ample to have paid every debt with interest that he owed, and have left \$100,000 to his orphan children! The bills for a foreclosure had been pending for years, and were ready for a decree almost at the period when these judgments were had. That decree was rendered before these sales *took place*, without any one to look after their interest; with no assets to redeem—130 acres of land, proved in this record to have been worth, two years ago, \$800 to \$1,000, per acre, is sac-

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rificed for *the poor pittance* of four thousand dollars. We solemnly ask this court why should such a construction be given to any statute? which should bring about so monstrous a wrong? *Cui bono?* Not for the creditor, who could easily have had, in this case, a return of no property, have become a party to the equitable proceedings for foreclosure, and been provided for in the very decrees on the mortgagees, by which their debts were realized. Why should infant children be made the mere playthings of creditors, and stripped of their patrimony by a construction of the statute, not authorized by its words, nor sanctioned by a just legislative intention? The court requires no stronger evidence than the facts disclosed in this record of the ruinous sacrifices, which it is possible for a creditor to effect under such a construction.

There was an indecent haste and hurry in these proceedings, and an admission by the administrator, as to the justice of Sloop's account, which shows, at least, an unwillingness to have his accounts subjected to the Chancellor's scrutiny. This court has held that the policy of the statutes of 1824 and 1828 which subjected equities to execution, was to substitute the liabilities of choses in action for the *ca-sa*, and such a policy would hardly extend to heirs.—(*Snyder vs. Hitt*, 1 *Dana*, 205.)

It has also held that the purchase under Sheriff's sales of the mortgagor's equity of redemption, if made for less than two-thirds of its value, is subject to redemption within twelve months; (*Abel vs. Wilder*, 7 *Ben. Monroe*, 532-3;) and that the legislative intent, by the statute of 1828, was not to divest even the mortgagor of the possession until the twelve months had expired. Is not such an intent inconsistent with the view that the interest of infants might be reached by such a statute, and when they are clearly incapacitated from the power of redemption?

4. Could this equity have been subjected to execu-

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tion on the eve of an interlocutory decree, foreclosing these mortgages?

The authorities cited by the other side were attachments in which the legal title was not divested. In mortgages the legal title is out of the mortgagor, and his equity is under the control of the chancellor. The cases, therefore, do not militate against our position. In *Addison vs. Crowe*, 5 Dana, 280, *this court says* "that a mortgagor has no right to give any direction for the sale of his equity redemption after a bill filed for foreclosure, and that a sale of this equity, under such circumstances, would be inoperative."

This rule is sanctioned by direct authority in New York, and by sound policy every where. It prevents confusion and sacrifice. Every consideration of public policy would seem to indicate that a proper construction, therefore, of the statute of 1828, should confine it to the mortgagor, and not extend it beyond the words of the statute to the heirs. Should, however, such an extension be given, it becomes doubly important to the rights of infants thus exposed, that the creditor should not be entitled to this lien after a bill for foreclosure has been exhibited, but that he should come into a court of equity, exhibit and prove his claims there, where the rights of an infant can be fairly protected.

We invoke the attention of the court to the fact, that the attorneys of Sloop were the purchasers of *this property*. A purchase by an attorney will always predispose the chancellor to look on the transaction with peculiar scrutiny and jealousy, and should never be sustained when it was for a grossly inadequate price. (4 *Johnson, Ch. R.*, and other authorities cited; *Howell's heirs vs. M'Creary's heirs*, 7 Dana, 388.)

In the present case we are in a court of law, but when it is perceived that Sloop is a non-resident, (as is shown by his bond for costs) and that one of the attorneys, Daniel Mooar, became the owner of this property, and that the defendants claim under him;

that \$120,000 were sold for \$3,700, that sale made in indecent haste, under a questionable and loose levy, if sustainable at all, and of equitable interest, of infants; does it not amount to such a fraud as vitiates the sale? Will this court lend its power to sustain such a sale?

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As the other points have been fully dwelt on by my distinguished coadjutors, I submit the cause, with the confident assurance that the law is for Howell's heirs, and that a new trial should have been granted. A reversal is, therefore, respectfully asked.

Wm. B. Kinkead, for appellees—

It is urged by the counsel for appellants, that these levies and sales are void, and that the Sheriff's deed conveyed no right or interest; and to sustain this position they make a number of points which I shall proceed to answer, one by one, in their order as they are presented.

1. They contend that an *equity of redemption* which has descended from the ancestor to the heir cannot be subjected to a levy and sale, under an execution which issued upon a judgment against the heir.

It is true that such estate is subjected to levy and sale under execution, only by virtue of the Kentucky statute. It is moreover true that real estate could not at common law be sold under an execution of *fi. fa.* and can only be sold by virtue of the Kentucky statute. The words of the statute authorizing the sale of the equity of redemption are as follows:

"When estate, real, personal, or mixed, is covered by mortgage, &c., all the right, title, and interest, legal or equitable, which the mortgagor or grantor has in said estate, shall be subject to be levied upon and sold by execution in the same manner as such property might have been sold if no such incumbrance had existed."

Now, it is contended that this statute only makes the equity of redemption liable to sale while held by

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the mortgagor, and that upon his death, when his right and interest descend to his heirs, it is no longer liable to execution; that this statute, which gives a power not existing at common law, cannot be construed to embrace a case beyond the letter of the statute itself.

This view of the statute seems to me to be altogether too confined and technical, and altogether opposed to the uniform manner of construing such statutes adopted by this court.

This is a remedial statute, not in derogation of the common law, but giving an additional remedy for the collection of debts not known to the common law. Such statutes have, by this court, been always liberally expounded in order to carry out the manifest will of the Legislature. And if a literal construction of an act would evidently fall short of the object of the Legislature, they have not confined themselves to it, but have given a more liberal construction in order to effectuate that object. (See the case of *Philips vs. Pope's heirs*, 10 B. Monroe, 172.)

In the case of *Mason vs. Rogers*, 4 Litt., 377, the court says, "that it is an established rule of construction, applicable to all remedial statutes, that cases within the reason and not within the letter of a statute shall be embraced by its provisions."

The heir stands in the place of the ancestor. He holds an equity of redemption just as it descends to him. And there can be no possible reason why, with all the guards and protection our statutes throw around the heir while an infant, that for a debt of the ancestor such an interest which descended to him should not be subject to a levy and sale under execution.

By the act of 1792, *Statute Law*, 316, the same action which will lie against an executor, &c., may be brought jointly against them and the heir. By virtue of this statute, lands descended may be, and are often sold under executions. It seems very clear, as I think, the Legislature intended thus to subject

to sale any interest they might hold in land thus descended to them.

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There is certainly no analogy between the present case and that cited by the counsel for plaintiffs, of a sale of the equity of redemption under execution, upon a judgment for the debt embraced in the mortgage. It is well settled this cannot be done. But the reason of this rule rests altogether upon a different principle than what would apply to the present case. An examination of the decisions upon that point, will clearly show that no argument can be thence drawn to sustain their present position.

2. But it is further contended, in the second place, that the sale under an execution was void because there was a bill pending by the mortgagees for a foreclosure, when the levy and sale were made under the execution.

It seems to me there can be no plausible reason for such an objection. The statute makes the equity of redemption subject to the execution as other property. It is this interest which is to be sold and which is not changed by the fact that suit at the time of the levy has been commenced by the mortgagee for a foreclosure. This was a right in him so soon as his mortgage was forfeited, and his commencing suit neither diminishes nor increases the interest of the mortgagor.

But this court has repeatedly settled the principle involved in this point. In the case of *Oldham vs. Scrivenor*, 3 Ben. Monroe, 580, this court decided "that land which has been attached in chancery, may still be sold under an execution against the owner or defendant in the attachment. And the purchaser under the execution takes it subjected to the equitable lien thereon." And in the same book, (3 Ben. Monroe, 134,) it is settled "that though a bill may be pending to render effectual a mechanic's lien, a sale under an execution will vest the purchaser with any interest of the defendant beyond what is necessary to satisfy

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such lien, and to that extent the sale would be effectual?"

3. But it is contended, in the third place, that the sale under the execution was void because no mortgage was referred to in the levy and sale.

It has been decided by this court that the sale of all one's right, title and interest, carries that interest, whatever it may be. (See the case of *Daugherty vs. Lanthicum*, 8 Dana, 189.)

The statute making the equity of redemption subject to execution makes no such requirements. This interest can be known by all. The records are public. All mortgages, no matter how many, to be effectual, must be found there. All who wish to buy can then see and know what interest they are buying. It is conceived no practical benefit would be derived by requiring the Sheriff to describe what mortgages were upon the property. All persons wishing to bid for property would prefer having an examination made by one better qualified to make such an examination than the Sheriff. Nor is it the practice of Sheriffs in making such sales.

But whether the Sheriff ought to have done so or not cannot vitiate the sale. It would, at most, be only an irregularity and not such as to render the sale void.

4. But it is claimed, in the fourth place, that the sale is void because the levy does not sufficiently describe the property. The cases cited to sustain this position have no resemblance to the present.

It is described on the levy as "about 375 acres of land, near Covington, on the waters of Willow Run, the late residence of said Howell, and now of the heirs, and particularly described in various deeds to said Howell from the heirs of Wm. Martin and others."

This description seems to me to be complete and such as renders it perfectly certain what land is levied on. It is shown that Howell in his lifetime resided on this tract, of about that quantity of land;

that he lived there many years, having bought most of it from Martin, and a small portion from others; that this was his residence at the time of his death; that his heirs lived on it after his death, and were, at the time of the levy, residing on it. It was near the city of Covington, on the waters of Willow Run. And this tract was well known as "The Howell Farm" from his long residence thereon. The Howell tract embraced the quantity of land levied on. It was all in one tract, and from what appears, Howell had no other land in that vicinity, besides this, upon which he, and his heirs after him, resided.

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Such a description of the land as, in this levy, would have been sufficient in a bond for a title to have secured the same, and surely would have been sufficient in a levy. In the case of *Hanly, &c., vs. Blachford*, 1 *Dana*, 4, this court decides "that such a description, 'Adjoining them on the north,' in a bond for a title to land of the vendor, adjoining land of the vendee, is sufficiently definite to take the case out of the statute of frauds and perjuries." The present description is much more definite than the one above cited. The cases cited by the plaintiff's attorney, it is conceived, have no bearing upon the present issue.

Again, it is insisted by the plaintiffs, in the fifth place, that the levy was void because it does not appear that the Sheriff was ever on the land said to be levied on, &c., and in support of this point the court is referred to the case of *McBurnie vs. Overstreet*, 8 *B. Monroe*, 304.

By the examination of the case cited, the court will see that the matter therein settled, bears no relation to the point here made. That was the case of the act of the Sheriff, who, in his return, which was made after he went out of office, says his levy was made while in office, and the sale after he went out of office. There the court says "the return by him of his levy and sale are *prima facie* evidence thereof,

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subject to be impeached and falsified by extrinsic testimony."

In the present case the Sheriff made the levy and sale while in office. He makes the proper return of his official act, and this is conclusive between these parties, as has been too often decided to require any parade of authority. But even if it were allowable, there is no evidence that the levy was not properly made.

It is contended in the sixth and last place, that the statute requires the purchaser to give bond to the Sheriff that he will not sell the property in twelve months, which was not done, and hence the sale was void.

The words of the statute are, "that he will not sell or remove the property out of the State." By a careful examination of the statute, the object to be effected, and the purpose of this provision, it will be most manifest that this part of the statute applies wholly to sales of personal property. It can apply to nothing else. Real estate cannot be removed. And the defendant having the right of redemption for twelve months, obviates all the necessity for a bond, which, in reference to real property, would be preposterous indeed. The party purchasing the equity of redemption can make no sale which will affect any of the rights of the defendant in such execution.

That the plaintiff on this execution made this purchase, has no effect to invalidate the sale. When he has acted in good faith he has as much right to buy as any other person, and the sale is just as valid. (See *Sanders vs. Norton*, 4 *Monroe*, 465.) The sale in the present case was fairly conducted. There is not the slightest evidence of any collusion between the plaintiff, in the execution, and the Sheriff or any other person.

The land, at the time of the sale, was held at a low rate. It has since that time greatly enhanced in value, as the city of Covington has grown. And

now and thus incited, the plaintiffs have made this effort to recover that which, many years ago, was sold for perhaps its full value to pay the just debts of their ancestor.

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James Harlan, on the same side—

1. At the time Howell died, he was in the possession of the land, and claimed it as his property.— Upon the payment of the money for which it was mortgaged to the Northern Bank, Beatty & Co., and Thompson & Co., the legal title, which had vested in the elder mortgagee, would *eo instanti* vest in Howell, without any writing whatever. (1 *J. J. Mar.*, 557, *Breckinridge vs. Ormsby*.) The right which existed in Howell upon his death descended to his heirs. They occupied precisely the same position, and were entitled to all of the rights which were possessed by their ancestor when he died. It was their estate incumbered by the debts set forth in the mortgages, and upon their payment, the title would vest in the heirs.

Sloop instituted two actions of debt against the personal representative and heirs; pleas were filed and verdicts and judgments rendered against the defendants. Upon the judgments executions issued to the sheriff of the county in which the judgments were rendered and the defendants resided.

The correctness of the proceedings thus far has not been questioned. The sheriff levied the executions “upon all the right, title and interest, in and to the equity of redemption of the said heirs of said Howell, deceased, in and to 375 acres of land near Covington,” &c. It is expressly stated by the Sheriff, that the administrator had no assets in his hands to pay the executions. A sale was made and Sloop, by his attorneys, (he being a non-resident as the record shows) purchased the interest sold, for \$3,700.

It is now contended, that nothing passed by the sale, because the interest, right or title which the heirs of Howell had in the land was not liable to be

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levied upon and sold under execution. And whether it was or not, depends upon the construction which this court may put upon section 36 of the execution law, (1 *Statute Law*, 653.)

That section reads: "When estate, real, personal or mixed, is held or covered by mortgage, deed of trust or other incumbrance, all the right, title and interest, legal or equitable, which the mortgagor or grantor has in said estate, *shall be subject to be levied upon and sold by execution, in the same manner as such property might have been sold if no such incumbrance had existed; and the purchaser shall take it, subject to such incumbrance*, and may pay off and discharge such incumbrance, and thereby perfect his title thereto, in the same manner as if the grantor, mortgagor, or other person having an equity of redemption therein might do: *Provided, however*, That when such property shall be real estate, then the mortgagor or grantor shall have the right to redeem the same within the year, but if the purchaser under execution shall have paid off and redeemed the real estate from such incumbrance, then the grantor or mortgagor shall also repay and refund the amount properly paid by such execution purchaser in discharge of such incumbrance, within the same time, and payable in the same manner as the purchase money is by this act made payable."

Then follows a proviso "that the purchaser or purchasers of *any such mortgaged property*, shall, before he takes possession of the property, give bond and security, that he will not within twelve months, sell or remove the property out of the State, but that he will, during that time, have the property at all times forthcoming, unavoidable accidents excepted, to any order or decree of any court of competent jurisdiction."

Another proviso is added giving courts of chancery power to control the estate, and prescribes the nature or character of the bond to be executed by the

purchaser, and the remedy to enforce a compliance with its provisions.

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If the property "shall be subject to be levied upon and sold by execution in the *same manner* as if said property might have been sold if no such incumbrance had existed," we are to ascertain whether, if no incumbrance had existed, it could have been sold under the executions issued on the two judgments obtained by Sloop against the administrator and heirs of A. P. Howell.

The second section of the act of 1792, (1 *Litt. L. K.*, 128; 1 *Stat. L.* 778,) provides, that "the same actions which will lie against executors or administrators may be brought jointly against them and the heirs and devisees of the dead person, or both, and shall not be delayed for the non-age of any of the parties."

This section is copied from the act, entitled, "an act subjecting lands to the payment of debts," approved, December 17, 1792. (1 *Litt. L. K.*, 128.)

It was decided by this court at the spring term, 1805, in the case of *Thomas vs. Marshall, Hardin*, 19, that an *equitable* interest or claim to lands was not the subject of levy and sale under the act of '92; that the act meant *legal* rights only. The court, however, proceed to say: "But in considering what are, and what are not equitable interests, and from the view which the court has taken of the manner in which a man may acquire and complete a title to lands, it is the opinion of the court, that an *entry* or *survey* for lands is an inchoate and incomplete legal title; *they will descend, may be devised, or aliened, and that they vest such legal interest, as under the provisions of the act, may be sold by virtue of executions.*" Similar decisions followed, (see 3 *Bibb*, 366; 2 *Bibb*, 94; 4 *Bibb*, 266.) All, however, before the act of 1821, subjecting equitable interests to execution. The only change or amendment of the act of '92 is contained in the act of 1819, which authorizes a separate action against the devisees or heirs where a previous judgment against

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the executor or administrator had proved ineffectual.
(1 *Stat. Law*, 780.)

All the right, title and interest which A. P. Howell had in the land at the time of his death *descended* to his children. He was in the possession of the land at his death, and his children remained in the possession thereof afterwards, claiming it as heirs of their deceased father, and they were thus possessed when the executions of Sloop were levied. The executions that issued on the judgments recovered by Sloop, commanded the Sheriff of Kenton county "that of the estate of A. P. Howell, in the hands of Julius Brace, his administrator, and of Elizabeth Ann Edwards, &c., (giving the names of all the heirs) *descended* from their ancestor, the said A. P. Howell, deceased, you cause to be made the sum of," &c.

Now, if the heirs had an *interest* in the land which "*descended*" to them from their ancestor, the Sheriff was authorized and required to levy the executions thereon, and make sale thereof; because the act of 1828 made it subject to levy and sale by execution "*in the same manner as such property might have been sold,*" if no mortgage had been executed.

It seems to me, that this view of the question is conclusive.

But it is contended on the other side, that the 36th section of the execution law of 1828 only authorizes a sale of real estate that has been mortgaged where the execution is against the *mortgagor*; and that in the event of his death, and a judgment is rendered against his heirs, such mortgaged estate is exempted from sale by execution against *them*.

It seems to me that the argument to support that construction of the section may, with propriety, be deemed hypercritical.

It is well known to all Kentucky judges and lawyers that the execution law of 1828 was very unskillfully drawn, that the draftsman was very unfortunate in the use of words to convey his meaning.

If every part of the 36th section is to receive a

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literal construction, the purchaser of an equity of redemption in *land* would be compelled to execute bond with security that he would not, "within twelve months sell or *remove* the property *out of the State*," but neither the draftsman of this act, nor the Legislature, intended any such ridiculous act to be done by the purchaser as to give bond not to *remove land*.

The language of this court in the case of *Philips vs. Pope's heirs*, 10 B. Monroe, 172, upon the construction of statutes, applies with much force to the present question. The court say: "But while it is admitted that the court has no power to make the law, it is equally true, that it is their province and duty so to expound the statutes as to ascertain and effectuate the will of the law-makers. And experience has shown that if every word or clause of every statute were to have its literal force and effect, without regard to the context and spirit of the whole, or to the subject matter, or the causes or the consequences of the enactment and of the construction, some statutes might be found wholly incapable of enforcement, while others might, in their operation, defeat or fall entirely short of their manifest object. Upon this subject we quote from the opinion of this court, in the case of *Mason vs. Rogers*, 4 Littell, 377, the following passage not less truly than forcibly expressed. The court then said: 'The literal interpretation of an act is certainly not, in all cases, the interpretation which either reason or law requires to be given to it; for it is not the *words* of the act, but the *will* of the Legislature which constitutes the law; and though words are the most common, they are not the only signs of the legislative will. The context, the subject matter, the effects and consequences, and the reason and spirit of the law, are often called in to aid in ascertaining the intention of the Legislature. No language is, indeed, so perfect as to afford words to express every idea upon all subjects; and even where words are not wanting, those that are most

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happily adapted to the purpose in view, do not always occur to the minds of the Legislature. Hence it is that words are employed which sometimes go beyond the legislative will, and sometimes fall short of it, which sometimes are too general and comprehensive, and sometimes too particular and restricted. And it is, therefore, an established rule of construction, applicable to all remediable statutes, *that cases within the reason and not within the letter of a statute, shall be embraced by its provisions, and cases not within the reason, though within the letter, shall not be taken to be within the statute.*"

The case of *Mason vs. Rogers*, referred to and quoted from in *Phillips vs. Pope*, was upon the construction of the laws respecting executions.

The absurd effect of pursuing the *letter* of a statute is shown in the case of *Feemster vs. Anderson*, 6 *Monroe*, 539.

The act of '92 subjected lands to the payment of debts; but it was decided that the legal estate only could be sold under execution or otherwise; for in *Buford vs. Buford*, 1 *Bibb*, 305, it was decided the chancellor had no power to subject an equitable interest in land to the payment of a debt. The same act of '92 authorized a joint action against the personal representative and heirs; and it cannot be doubted that under an execution issued on such a judgment, real estate, of which the legal title was in the ancestor when he died, could be sold as estate descended to the heirs. In 1821, and re-enacted in 1828, the act of '92 was amended so as to authorize the levy on and sale of land incumbered by mortgage, "*in the same manner as such property might have been sold if no such incumbrance had existed.*" There is no exception in favor of heirs, and no exemption of land or other property thus circumstanced from being made liable to the payment of the claims of judgment creditors. And the statute should not be so construed in the absence of anything in it from which it may be inferred such was the legislative will. If

such had been the intention of the Legislature, it would have been declared in a proviso.

In the case of *Bell vs. Commonwealth*, 1 *J. J. Marshall*, 555, it was held, that after the passage of the act of 1821, it was as much the duty of a Sheriff to levy upon, and sell the interest of a defendant in land covered by mortgage, as if he were the absolute and fee simple owner. Nothing is said in that case excepting lands or interest in land which may descend to heirs. I contend that the plain and obvious meaning of the acts are that whatever property was liable to be taken in execution and sold when the owner was alive, that upon his death a judgment is rendered against his heirs, that the same property is liable to satisfy the execution against them as it was against the ancestor, and that that is the proper and reasonable construction of the several statutes which bear on the question.

That a landlord cannot distrain on the equity of redemption, as was decided in *Snyder vs. Hill*, 2 *Dana*, 204, and a mortgagee cannot levy on and sell mortgaged property for the payment of the debt for which the property was mortgaged, and decided in *Goring's executors vs. Shreve*, 7 *Dana*, 68, and that the interest of a mortgagee is not liable to sale on an execution, do not militate against the positions for which I contend, for the reasons stated in the opinions in those cases.

2. It is contended, that the sale under the executions passed no title, because there was a bill pending for a foreclosure. The rights of the mortgagees were in nowise affected by the sale, because, by the words of the statute, the purchaser took the property, *subject to the incumbrances*. The statute contains no restrictions upon the right to sell the property of the defendant which may be incumbered. It does not confine the right to sell when no bill is pending for a foreclosure.

The general principles contended for by the counsel for appellants, is correct in some cases, namely:

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Where a court of chancery has assumed jurisdiction and has taken the property under its control, process from a court of law cannot interfere and arrest the property from the custody of the officers acting under the orders of the chancellor; but there are exceptions to this rule. In this case, the executions on the judgments obtained by Sloop did not, in anywise, interfere with the suit in chancery, and the complete execution of any decree that might be rendered. The sale of the equity of redemption and its purchase by Sloop did not render it necessary to make him a party. He was entitled to anything that might be left after the satisfaction of the mortgage debts. If those debts required the sale of all of the property, then the purchaser of the equity of redemption obtained nothing.

This court decided in *Glenn vs. Coleman*, 3 B. Monroe, 134, that land may be sold under an execution although a bill in chancery is pending to enforce a mechanic's lien. And in *Oldham vs. Scrivener*, 3 B. Monroe, 580, that land attached by chancery proceedings may nevertheless be levied upon and sold under execution. These authorities are conclusive on that question.

3. It is also contended that if property is covered by more than one mortgage, or in other words, that several equities of redemption of several mortgages cannot be sold under execution.

Although the statute uses the words "mortgage, deed of trust, or other incumbrance," it should not receive a literal construction. The object of the Legislature was to subject any property covered by any kind of incumbrance, to be sold in the same manner as if no incumbrance had existed. There was no reason why the right to sell should be confined to cases where there was but one mortgage. If a person who was involved and wished to prevent his property from being taken in execution, he could—if the doctrine contended for should prevail—avoid such a result by executing a separate mortgage to

each creditor. No good reason can be assigned for such a construction.

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4. It is also contended that the sale is void, because no mortgage is referred to or identified by the levy or sale.

My answer to this objection is, that the statute subjecting equitable interests to execution does not require the officer to set forth the amount of the incumbrances on the title. As the law required all mortgages to be recorded, it was better that the purchaser should make his own examinations and form his own judgment as to the amount of the liens, and regulate his biddings accordingly.

It is sufficient for the officer to know that the defendant, in the execution, has not the legal title—that incumbrances exist by mortgages or deeds of trust; and then it is the officer's duty to sell the right of redemption in the manner prescribed by the statute subjecting such interests to sale.

5. It is contended that the sale is void because the levy is uncertain in not designating, by a proper description, the land sold.

It seems to me that the description of the land is sufficiently full to direct the attention of any person who wished to become the purchaser. Indeed, a levy describing the land as the late residence of A. P. Howell, in Kenton county, would have been sufficient for all practical purposes. I submit whether a deed with such a description would not have been sufficient to vest the title in the grantee.

The return of a Sheriff cannot be questioned collaterally. It is conclusive between the parties.—(3 *Litt.* 128; 4 *Dana*, 150; 1 *B. Monroe*, 68.)

The Sheriff having returned he had levied on the land, the court will presume, in the absence of any proof to the contrary, that he did every act necessary to constitute a valid levy. (*Hickman vs. Boffman*, *Hardin*, 340; *Scott vs. Marshall*, 5 *J. J. Mar.* 434.)

In this case no attempt was made to prove that the officer failed to perform his duty and whole duty.

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No motion or other proceeding was instituted in the Circuit Court to annul or set aside the sale. And can this court say, upon the face of the papers, that the proceedings by which this land was sold are void?

6. It is also contended that the sale is void because no bond was executed, as required by one of the provisos of the 36th section. It is a sufficient answer to this objection to say, that the statute does not require a purchaser of land to execute a bond.—It only requires a bond from a purchaser of personal property.

7. A variance between the judgments and executions is also relied upon as fatal to the title. The transcript of the record does show a slight discrepancy, but there is enough to show that the executions that issued properly, belong to the judgments copied into the record. But this objection will be obviated by the issuing and return of a *certiorari*.

8. The failure of the Sheriff to indorse the *time* he received the executions is supposed by the counsel to be an available objection. That part of the statute is directory to the officer, and will not affect the title of the purchaser. (*Reid vs. Heasley*, 9 *Dana*, 324.)

9. The deed recites a levy of 370 acres, when the return shows a levy of 375 acres, is also relied upon by appellants. By referring to the deed it will be seen that the metes and boundaries are given "containing 375 acres 2 roods and 15 poles, be the same more or less."

This objection is not entitled to any serious consideration.

It seems to me that the only real question in the case is, whether the equity of redemption was liable to be taken and sold under the executions in favor of Sloop. I have attempted to maintain the affirmative of the proposition. There being no statute exempting it from sale, and as it was liable during the lifetime of the ancestor, that liability continued when it

became the property of the heirs by descent. The same property which could have been taken in execution and sold during the lifetime of the owner, is liable in the same manner on a judgment against his heirs.

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There was no parol proof showing any unfairness or improper conduct by the Sheriff; or that the amount for which Sloop purchased the interest of the heirs in the property was not considered, at the time of the sale, its full value.

The sale was acquiesced in until about the time this action was brought, and in the mean time, many persons have purchased portions of the land and made valuable improvements thereon, relying with confidence on the validity of the Sheriff's sale.— Under such circumstances, a court should not, except under very peculiar circumstances, (which in this case do not exist,) interpose to render invalid a sale made by an officer of the law in virtue of executions issued on judgments for valid and just debts, and thereby deprive innocent purchasers of property which they purchased and improved in good faith.

Upon the whole case, it seems to me, there is no error in the record, and the judgment of the Circuit Court should be affirmed with costs.

Chief Justice MARSHALL delivered the opinion of the Court.

July 3.

Julius Brace and wife and others, the children and heirs of Abraham P. Howell, deceased, filed this petition in ordinary, to recover about twenty-one acres of land, part of a large tract of about 375 acres, which had descended to them from their father, and of which a considerable portion having been sold under a decree for the foreclosure of three mortgages which he had executed, the residue, of which that now in contest is a part, is claimed to have been sold under two judgments and the executions thereon, against the administrator and heirs of said Howell. The plaintiffs rest their title on the alleged invalidity of these sales, and of the Sheriff's deed, made to

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effectuate them. If these are valid, the plaintiffs have no title to the land, and the judgment for the defendants must be affirmed.

1. Of the various objections taken to these sales, the one of the greatest general importance is that which assumes that the 36th section of the general execution law of 1828, which subjects to sale the equity of redemption in mortgaged lands, subjects that interest in the hands of the mortgagor only, and to an execution against himself personally, but not to an execution against his heirs, to whom the equity may have descended. The substantial part of the 36th section, under which the question is made, is that, "when estate, real, personal, or mixed, is held or covered by mortgage, deed of trust or other incumbrance, all the right, title and interest, legal or equitable, which the mortgagor or grantor has in said estate, shall be subject to be levied upon and sold under execution, in the same manner as such property might have been sold, if no such incumbrance had existed, and the purchaser shall take it subject to such incumbrance, and may pay off and discharge such incumbrance, and thereby perfect his title thereto, in the same manner as the grantor or mortgagor, or other person having an equity of redemption therein might do. Provided, however, that when such property is real estate, the mortgagor or grantor shall have a right to redeem it within the year, and if the purchaser shall have paid off the incumbrance, the amount shall also be refunded to him within the year." The act of 1792, subjecting lands to the payment of debts, (1 *Litt. Laws*, 128,) enacts in its first section that lands, tenements, and hereditaments shall, and may by virtue of writs of *fiery facias* be taken and sold in satisfaction of all judgments in a manner hereinafter prescribed. It enacts in the second section, and doubtless as a means of effectuating the enactment of the first, that "the same actions which will lie against executors or administrators, may be brought jointly against them and the heirs,

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and [or] devisees of the dead person or both. It was decided at an early day in *Thomas vs. Marshall*, spring term, 1805, that the first section of this act did not embrace equities, but applied to legal rights only, or such title in land, as in case of goods would authorize a levy and sale at common law. If it had been the effect of the first section to authorize the sale under writs of *feri facias* of the equitable title or interest of the defendant or debtor, we think it cannot be doubted that the second section would have been construed and understood as furnishing the means of subjecting the same interest to the satisfaction of the ancestor's debt, by obtaining a judgment against his heirs to whom it had descended. The intention was to subject the lands of a debtor to the payment of his debts, and to the extent that lands subject to execution, in the hands of the debtor, had descended to the heirs, the remedy against them in the hands of the latter, while the debt remained unpaid, was intended and understood to be commensurate with that which was given against them, in the hands of the debtor himself. Equitable titles or interests, not being subject to execution under the statute referred to, were not legal assets when descended to the heirs, and were not the foundation of a judgment against him, on the plea of nothing by descent. In the case of *Brown vs. Bashford*, 11 B. Monroe, 67, it was decided that a resident citizen of this State, could not be made liable here for a simple contract debt of his father, on the ground that lands situated in the State of Ohio had descended to him as heir of his father, principally, because the assets in Ohio could not be reached here, "and therefore do not seem to be the proper ground of a judgment which, according to its terms, indicate its real foundation should be levied on the assets descended." And the case of *Payne vs. Logan's administrator*, 4 Bibb, 402, is referred to as deciding that a devise of land lying out of this State, did not make the devisee liable as such to an action here; and as say-

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ing that such lands would not here be assets in the hands of the heir; and in the case of *Harrison vs. Campbell*, 6 *Dana*, 263, the court conclude their answer to the third objection made to the decree, with the following sentence, page 277: "It may be added, however, on this point, that if, as seems probable from the evidence, the mortgage is for the full value of the property, and the equity of redemption even, as between the heir, and the mortgagee worth nothing, it would not have authorized a judgment against the heir for any amount, and the jury might, in that case, find nothing by descent." From which it is evidently to be implied, that if the equity of redemption, which had descended, were of any value, it would have authorized a verdict that assets to the amount of its value had descended to the heir; which, as is plain from the whole case, would also have authorized a judgment against the heir for the debts not exceeding the assets. And this, according to the principle of the cases before cited, and also of the case of *Harrison vs. Campbell*, could only have been on the ground that the equity of redemption having been rendered, by statute, accessible to an execution against the ancestor, descended to the heir not as equitable assets, as they had formerly been, but as legal assets, and was the proper foundation of a judgment against the heir, because it was accessible to an execution against him, and such, as we think, has been the opinion of this court and of the bar and the country, since equities of redemption have been subjected to execution.

1. The equity of redemption in lands which may descend to heirs, is liable to sale under execution, upon judgments against the heirs, for the debts of the ancestor.

The legal and logical consequence, as it seems to us, of subjecting to legal execution the equity of redemption in the hands of the mortgagor, is that when it descends to his heir it is legal assets in his hands; and this consequence cannot, as we think, be repelled by anything short of the clear indication of a contrary intention in the statute, which imparts to the equity of redemption this important quality of being liable as a legal estate in the hands of the an-

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cestor. The construction contended for, by which this consequence is repelled, derives its entire support from the words, "all the right, &c., which the mortgagor has in said estate," and in fact limits the effect of the substantial part of the statute, by the literal import of the word *has*, which, being in the present tense, is said to limit the interest which may be levied on and sold, to that which the mortgagor has at the time of the levy, or at least at the time when the execution comes to the officer's hands. Whence it is argued that as soon as it passes from his hands, whether by death or otherwise, it ceases to be in the condition in which it is subjected to execution. But the thing itself and the proper incidents attached to it, remain the same; and although its condition is in some sort changed, by passing from the hands of the indebted mortgagor, yet its essential character is unchanged, and as it passes into the hands of his heirs, where it is still liable to his debts, and makes the heirs also liable to the extent of its value, there seems to be no decisive reason why the character which the law impressed upon it in his hands, should undergo a change by its transmission to volunteers.

The statute intended to subject to execution the interest of the mortgagor or grantor, in estates held or covered by mortgage or deed of trust, and in construing a clause so evidently abounding in superfluous words, it would be unreasonable to place the whole force of this provision upon the words "which the mortgagor and grantor *has*." We think they were intended to mean nothing more than to denote the party whose interest was to be subjected, and are to be understood as equivalent to the words "of the mortgagor or grantor." And if any inference is to be founded upon the mere words of the sentence, the subjection of his interest to levy and sale in *the same manner* as if there were no incumbrance, might sufficiently imply, that it may be subjected in the hands of his heir as well as of himself. If *the same manner* is to be applied to the levy and sale merely, and not to the

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subjection of the interest, this restricted application, though it furnishes no aid to our construction of the previous clause, places the levy and sale of an equity of redemption which is properly subject, on precisely the same footing as if the land itself, instead of a partial interest in it, were the subject of the levy and sale, and no objection can prevail against the mere form or manner of the levy and sale, which would not be available if any other interest than that of the mortgagor were the subject. And there being no more necessity under the directions of the statute, of stating in the levy and sale the particulars of this interest, than of any other, the objection that the interest was not particularised by a statement of the several mortgages which encumbered the land, is deemed untenable.

2. It is not necessary, to render the sale of an equity of redemption valid, that the sheriff should specifically set forth in his levy and sale, the amount of the mortgage liens upon the land.

It never has been held, nor as far as we know, supposed that it was the duty of the Sheriff to take upon himself the burthen of ascertaining, and the responsibility of stating the value, or the facts which might determine the value of the incumbered interest to be sold. When he states the interest to be an equity of redemption, or the title to land under mortgage, which is all that is usually done, he of course refers every person concerned to the records. And even if he were to copy or to abridge the recorded mortgage or mortgages, or were to read them at the sale, the amount due, the real burthen which affects the value of the interest, would not be thereby ascertained. If sacrifice be the probable and usual consequence of the ordinary mode of proceeding in such cases, this may be a good reason for legislative interposition to change the practice, or to abrogate the proceeding by which the interest of the mortgagor is to be sold. It cannot justify the court in avoiding a levy and sale fairly made in the form established by a practice, authorised by the general or vague language of the statute, and on the validity of which an immense amount of property must depend. Nor is this consideration of probable sacrifice in the sale of

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mortgaged estates descended to infant heirs, a ground for making a distinction in favor of infants which the statutes have not made, or for saying that an equity of redemption, though subject to execution as a legal estate in the hands of the mortgagor, ceases to be legal, and becomes equitable assets when it descends to his heir, and that it is either not the foundation of a judgment against him, or not accessible to an execution upon such judgment. In short, it does not authorize us, in giving construction to this statute, to keep out of view the general principle and purpose of giving remedy against the heir for the debts of the ancestor, and to limit the effect of this statute, as a part of the system for subjecting lands to the payment of debts, by giving an exclusive meaning to a few words which were probably intended to have a general signification, and by giving extreme force to the use of a verb in the present tense, which, as frequently and indeed commonly found in statutes, refers not only to the present, but to all time. The construction by which the statute has been held not to authorize a sale of the equity of redemption on an execution for a debt secured by the mortgage, is not founded in any considerable degree, if at all, upon any extraneous consideration, but chiefly, if not exclusively, upon the ground that as the necessary effect of such a sale is to diminish or extinguish the incumbrance, which the statute clearly intends to preserve as paramount to the purchase; such a sale would defeat the manifest intention and objects of the statute, and therefore cannot be regarded as being authorized by it; that it would tend necessarily to a sacrifice of the mortgagor's interest, is a consideration connected with the other. The cases referred to on this point do not, therefore, apply to authorize the construction now contended for. And while it is a source of regret that the statute, as we understand it, may operate, and has perhaps, in the present instance, operated to cause a sacrifice of the estate of infant heirs, we

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cannot adopt the construction by which an equity of redemption descended to infant heirs, is to be wholly exempt from the operation of a judgment and execution against them for their ancestor's debt. The statute certainly authorizes no discrimination between the case of infant and that of adult heirs. And if an equity of redemption descended to the heir be exempt from levy and sale on a judgment and execution against him for his ancestor's debt, it must be equally exempt from an execution on a judgment against him for his own debt. That the exemption in this last case would be obviously inconsistent with the manifest objects of the statute, we think is entirely certain. And this, if there were no other reason in support of the construction which we have adopted, would, of itself, form a consideration entitled to great weight.

3. That an execution omitted to issue for interest, when interest was given held not a sufficient ground to invalidate a sale made under it, when there was no suggestion that there was any other judgment between the parties.

2. The next objection which we shall consider, is that the two executions under which the sales are claimed to have been made, vary slightly from the judgments exhibited as the foundation of them. Both of the judgments appear to have been rendered on the 26th of April, 1845. That which stands first, upon the amended record, is for \$1,437 33—the damages found by the jury, with interest from the day of its rendition. The other is for \$4,329 56—the damages found by the jury with interest from the date of its rendition. The jury, in each case, having found that estate had descended to the heirs, of the value of \$5,000. The execution alleged to be founded on the first judgment, is for the sum of \$1,437 62, but omits entirely the interest. The other is for \$4,327 56, and also omits the interest. Each bears date on the 14th day of May, 1845, and each was levied on the same tract of land at the same time, or at least on the same day. The first of these executions appears to form a part of the same record which contains the first judgment, and the other to form a part of the record of the second judgment. Each of these records is certified in the usual manner, as

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being a complete transcript of the proceedings in the particular case. And there is no attempt to show any judgment corresponding more nearly than those above referred to with either of the executions, nor to show any execution corresponding more nearly with either of the judgments. Nor is there any suggestion that there were in fact any other judgments or executions between the same parties. There is then not only a presumption, but there is no ground for serious doubt, that each of these executions was issued upon the judgment above stated, to which it most nearly corresponds. It is obvious, therefore, that the slight discrepancy between the executions and the judgments, was merely a clerical misprision, and although there may be a technical variance, it is to slight, in view of the evidence that these executions actually issued upon the respective judgments with which they so nearly correspond, to be the ground of pronouncing the executions or the sales made under them absolutely void and of no effect.

3. It is objected, however, that the returns on the executions show an uncertainty and confusion in the sales themselves, and an illegality, which should render them void. The return on each execution states a levy and sale of the tract of land for a sum considerably smaller than that which the execution authorized to be made. Upon comparing the two returns, it appears that both executions were levied at the same time, on the same tract of land, and the returns taken literally import a separate sale and purchase of the entire tract, under each execution, for the separate sums stated in the respective returns, and neither return makes any reference to the sale under the other execution. It was no doubt the duty of the Sheriff to have made but one sale under both executions, and to have credited each ratably, or to have credited on the smaller execution its full amount, and to have credited the other by the remaining proceeds of the sale. And although we do not perceive by what rule, if there was a single sale under both

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executions, the sum produced was divided between them, yet it would be so absurd as well as unusual and irregular to make on the same day two sales of the same entire tract, upon these two executions of the same date, between the same parties, and presumably both in hand at the same time, that we should be disposed to regard the two returns as evidencing an awkward attempt at particularity and specialty in each return, rather than as proving conclusively that there were, in fact, two sales.

4. A Sheriff having two executions in behalf of the same plaintiff, and against the same defendant, returns on each execution the sale of the same lands. Held, that whether he in fact made two sales or one only there was no irregularity of which the defendants in the execution could complain.

But if there were really two separate sales, it is to be presumed that the return of each states the truth with respect to it, showing that the entire tract was sold for the sum named in each return; and as, if there were two sales, the one must have preceded the other, it is clear that the first cannot be affected by the second, however irregular and unauthorized the latter may have been; nor would the defendants in the judgments have any right to complain that the entire proceeds of the first sale were applied to the execution on which it was made. Or if this were a wrong to them, the remedy, if there were no other sale, would be by a correction of the credit and returns, and not by quashing the sale, which certainly would not be rendered void by the improper application of the proceeds. Nor do we perceive that the second sale, however illegal and void, could any more affect, injurously, the interests of the defendants therein, than it could make void the first sale. If the second sale be void, the first, which is valid, determined the right and ascertained the sure terms of a redemption. And although the returns may not, of themselves, show which sale was first made, this fact, if not presumptively determined by the order in which the judgments or the executions stand on the appropriate records, might be determined as a matter of fact by parol proof, and the failure of the Sheriff to designate the order in which the sales were made could not make either void. Nor, while we deem it certain if two sales were

made the last did not invalidate the first, do we decide that even the last was *ipso facto* void, or that it could have been avoided by the defendants who received the benefit, and were not injured by it. But it is so utterly improbable, either that the Sheriff should have made the two sales, as supposed, or that the plaintiff or his attorney, standing by, should either have permitted this course of action, or should, after purchasing the entire tract under one valid sale, immediately purchase, for an additional sum, the same tract again, under his own execution, of which he had complete control, that it was scarcely necessary to have shown that the fact, if so, would not have avoided both, if either, of the sales, and could not have injured the defendants in the executions.

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4. The objection that, at the time of the levy and sale under these executions, a bill was pending for the foreclosure of the mortgages on the land cannot be sustained. The pendency of such a bill did not exempt the equity of redemption from a sale which would still be subject to the effect of the decree upon the mortgage. This principle settled, with regard to the effect of suits for enforcing other liens, seems to be equally applicable to the case of a mortgage, and we so decide. This fact, therefore, did not make the sale void.

5. The pendency of a suit to foreclose a mortgage upon land presents no obstacle to the sale under execution of the equity of redemption, in behalf of another creditor.

5. The objections that the equity of redemption was not subject to execution because there was more than one mortgage; that the levies should have specified the several mortgages; that the levies do not sufficiently describe the land sold; that the Sheriff's deed does not convey the same land levied on and sold, and that the purchase being made by the attorney of the plaintiff, for him, is therefore void, so far as not already answered, may be answered without a detail, which, as to most of them, would be unprofitable, by the general statement that they are deemed insufficient, in themselves, or are not sustained by the facts appearing in this case. One or two other

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objections, not seriously relied on, need not be stated.

Upon the whole case we are of opinion that the Sheriff's sales and deed were not void by reason of anything appearing in this record, but that so far as the levies, sales and deed, covered the same land, they were *prima facie* valid, and sufficient to pass the title from the plaintiffs; and the opinions of the court in giving and refusing instructions, and upon the admissibility or exclusion of the records above referred to being in conformity with the principles of this opinion, therefore the judgment is affirmed.

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Case 7.

APPEAL FROM FAYETTE CIRCUIT.

A bill was filed to establish a lost will, and the will partially established. Subsequently other persons claiming to be heirs, and not parties to the first suit, filed their bill contesting the validity of the will as established. Held, that upon the trial of this second case, it was proper to admit, as evidence, the testimony found in the record, of all such witnesses as were dead or whose testimony could not be had; but not to read the bill of exceptions containing the testimony of witnesses who might again be examined. *Singleton vs. Singleton, &c.*, 8 B. Monroe, 368.

The facts sufficiently appear in the opinion of the Court. *Rep.*

George Robertson for appellants—

The case of *Singleton's* will, if any Kentucky authority were necessary, shows in a peculiarly strong light that no person, not a party on the record of the probate, can be concluded or affected by the judgment or the proceeding.

This case is regarded decisive of that point. I will proceed to a very condensed discussion of the case, on the facts and the law, on which alone this court *must* and *will* decide it:

1. We cannot admit that the testimony embodied

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in the bill of exceptions taken in the Circuit Court, in the former case, was admissible in this. According to the principles of the common law, it certainly would not have been. It was *res inter alios acta*. And the persons not parties when it was taken, having no right to cross-examine or to introduce witnesses, are, on universal principles of rational jurisprudence, not bound or affected by such *ex parte* evidence. Cases of probate, though *ex necessitate, in one aspect, quasi in rem*, do not constitute an exception. Where is there *any authority* to the contrary? The statute quoted by Mr. Johnson would have been altogether superfluous and delusive, had the common law rule been as he intimates. And that the object of the statute was, not to recognise an old rule, but to establish a new one, is proved by the fact that the statute does not allow the oaths on the first probate to have the same effect as on the probate trial, but only such as the jury may think it entitled to. Why that cautious and significant restriction? It means nothing more nor less than this—that the fact that the testamentary paper had been established, as certified by the testimony of A B and C should be some evidence before a jury, who might, according to the circumstances, give it as much weight as they might think it entitled to have. It does not mean that the facts proved by the witnesses shall be evidence before the jury—but only the general fact that it was established on *their "oaths."* This is the clear literal import of the entire clause; and this court should not strain it into any greater, whereby an anomalous rule would be established inconsistent with general principle, analogy, and reasonable fairness, to a litigant who was a stranger to the probate.

But this literal import is fortified by other considerations:

1. The 11th section, after authorizing a County Court to proceed immediately and *ex parte* with proof of a will, and to establish the probate of it, directs

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it to grant a certificate of *such probate*, which has been practically and universally interpreted as enjoining a record, and certificate of the fact of probate, and of the simple fact, also, and only, that it was proved by certain named witnesses. It then, in that connection and before closing the sentence, provides that any person interested may, within seven years, by bill, contest the validity of the will that is, as decided, require, on the appearance of all parties concerned, a re-probate. That section, as also construed by this court, did not contemplate such a remedy by any person who had contested in the County Court. In no such case of *ex parte* probate would the record exhibit the facts proved, but would only show the probate and on whose oath or "oaths." Nor was the Legislature then contemplating the case of such a bill, after a decision by the Appellate Court, between contesting parties, in that court, and the appeal then must have been to that court only. It is quite plain, therefore, that when, in the 15th clause, the Legislature say that, "in all such trials by jury, the certificate of the oaths of the witnesses, at the time of the *first* probate, shall be admitted as evidence, to have such weight as the jury shall think it deserves." They meant the probate provided for in the 11th section, that is, in the County Court. That what was a probate, and the "*first* probate," and the only one contemplated by the 15th section. An affirmance by the Appellate Court would only decide that the probate in the County Court should not be set aside, but should stand. It certainly could not be considered *the probate*, much less the *first* probate, and consequently, if even the testimony in the Court of Appeals should be recorded, (*which was never done*.) the 15th section would not apply to it, because the judge of that court was not the probate—certainly not the *first* probate. And there is another and conclusive reason why the 15th section does not apply to the trial in this court—and that is, there never was or could be a certificate of the facts proved in

the Appellate Court. All the same reasons, except the last, apply to the Circuit Court, which has subsequently acquired an intermediate appellate jurisdiction. And this exception can have no effect on the question, because it must be determined by the state of case existing when the statute was enacted; and if, then and therefore, the Legislature did not, in the 15th section, contemplate a certificate of the oaths of witnesses in the Court of Appeals, the appeal to the Circuit Court, under a long subsequent statute, could not be brought within the contemplation and purpose of the 15th section of the act of 1797.

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The 40th section of the Revised Statutes, instead of operating against our construction of the 15th section of the act of '97, fortifies it. It authorizes not the "oaths," but the "*record of what was proved*," and depositions, and not on the "*first probate*" only, but "in court," &c., and even then restricts the depositions to witnesses who could not be produced. This not only enlarges the act of '97, and tends to show that depositions ought never to be read if the witnesses could be produced.

2. We insist that the Circuit Judge erred in overruling our 4th instruction. The opinion of the Judge on the 3rd, seems to us to be inconsistent with his decision on the 4th, and we can imagine no reason for it, but an unwillingness to instruct that the hypothetical facts were entitled, *in law*, to a more conclusive effect than he seemed to apprehend that this court had given to them, in *Steele vs. Price and wife*, 5 B. Monroe, 58. Whether, and how far, there is collision between that instruction and this court's opinion in the above case, we will not now discuss. We respectfully urge, however, that if there be an essential collision, the opinion in said case, so far, was the first known to us, and was rendered without reference to, or apparent consideration of decisions by courts of the highest authority, directly to the contrary; and, moreover, this portion of the opinion

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seems to have been based on decisions which, in our humble judgment, do not authorize it. In the case of *Beauchamp*, this court, concluding that there had been an actual revocation by the testator himself, did not deem it necessary or proper to discuss the single effect of his knowledge of the destruction of it. This was all proper, reasonable, and in the uniform course.

In the case of *Davis vs. Davis*, *Ecd. Repts.*, there was no proof of testator's knowledge of the loss of his will; nor was there any such proof in any of the other cases relied on in the opinion, except in that of *Campbell vs. West*, 3 B. *Monroe*. And we respectfully deny that anything in that case authorizes the deduction that this court then thought or intended even to intimate that a knowledge by a testator of the loss or destruction of his will, when he had capacity and opportunity to make another, would not, by operation of law, make him intestate at his death, unless he published another good statutory will. The court only said in that case, in effect, that even, though it *may* be true that a knowledge of the loss of the will without making another, *may not, per se*, amount to a "revocation," yet it may lead to show that he approved or acquiesced in the loss. The point now agitated was not then considered—it was not necessary to consider it. This is not a question of "revocation," but a question whether, on the facts in this case, there *was any statutory will*. That point was not mooted or considered in the case, in 3 B. *Monroe*; the court there incidentally glanced at the question of "revocation," and even as to that spoke with great care by using the words *may not*, instead of *will not*—thereby showing that they did not, in that case, intend to decide it, as there were other grounds in abundance for its decision. Moreover, in that case, it did not appear that West had capacity or time to publish another will, and that might have been another reason why the court said "*may not*."

In support of the 4th instruction, I refer to the case

of *Calvin vs. Frazier*, 4 *Eccl. R.*, 127, 1,423, 150; *Trevellian vs. Trevellian*, 1 *Ib.*, 64-6, note a, in *Lilly vs. Lilly*, 5 *Ib.*, 67; *Davis vs. Davis & Evans*, *Ib.*, 410, and *Bets vs. Jackson*, 6 *Wendell*, 178-181, 188, 193, 198, 201, 202, 205.

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Some of these cases and others which might be cited, *sparsim*, show first, that, in such a case as this, declarations by a testator, as to his will or his intentions are entitled to but little weight, and are, *per se*, never sufficient; and on these authorities, and the reason of the case, the Circuit Judge, instructed the jury to that effect. And, second, that knowledge of the loss of the paper, and neglect to publish another, necessarily makes the decedent die intestate.

The reason for the first doctrine is, that testators often write and show wills to please or quiet some one else, and talk about reviving cancelled wills for the like reason. And those reasons never applied more forcibly, or were illustrated more aptly, than in this case. Here the old man, under obligations to several of his kindred, and much attached to several of them, but living large portions of his time at Price's, made often and always, when a little drunk, mock shows of peculiar affection. Why? To please and secure, without complaint, pleasant and obliging attentions to himself. Why else was he showing the will in her presence? Why did her father, who was his counselling brother, never hear of the paper? Why did he afterwards attempt or offer to sell the land, which would have revoked the will in its largest provisions? Why did he take the paper from her and assign a false reason for it—for her father says that he had not heard of any such paper, and therefore he could not have opposed her being a devisee? And, why did he say this brother-in-law, Col. J. Steele, of Woodford, that he had become offended with Price and her, and therefore had taken the will and would give them nothing? Why did he never restore the paper? Why did he not write or procure

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another if he desired to do so? And why did he, when he knew the paper was destroyed, say that he would get Sam Chew to write just such another, when he himself was far more competent, and had, without aid, written the destroyed one? Only because he was yet not willing for her to know that he had destroyed the paper, or acquiesced in the loss of it.

The reasons for the second doctrine are, to my mind, quite plain. The statute, for preventing perjury and fraud, requires a published written will. No purpose to make a will—no declarations to that effect—however the accomplishment of the purpose, according to *all* the requisitions of the statute, will be of any avail. But nevertheless, for the same purpose of preventing fraud, if a testator had complied with the statute, and died in the belief that he had left a valid will behind him, shall not be frustrated or defrauded of his purpose by the fraudulent destruction or accidental loss of it before his death, and without his knowledge. And this is not only right and consistent with the policy of the statute, but is as far as the English courts have ever gone in admitting oral proof of wills lost or destroyed in the life time of the testators; and as far, I think, as any other court court, except in the case in 3 *Ben. Monroe*, has ever gone.

But when a testator knows that his will is gone, and when he can, if he choose, supply the loss according to the statute, he is in the precise predicament in which he stood before he had published a testamentary paper. He *can* make a will according to the statute, and therefore must either do so or die intestate; and consequently, unless he do make one, the presumption is even that he elects to die intestate; or at the utmost, like the person who had never made one but intended to do so, had put it off or accidentally omitted to execute his purpose by dying with a statutory will. What is the difference between the cases? And if any other doctrine be established,

how completely may the statute be evaded and its policy frustrated? Suppose A, to please a teasing wife or friend, formally publish a statutory, will intending to destroy it secretly, or, having made it in good faith, changes his mind, and secretly throws the paper in the fire—in either case the paper having been destroyed by himself—if declarations such as those proved in this case, made for the purpose of concealing his act and ultimate purpose, would nevertheless establish, *in invitum*, a draft of the destroyed paper, then the protective object of the statute would be frustrated; and against the will and the act of revocation, a spurious will would be falsely palmed on the dead man. And when he himself is proven to have known of the destruction, is there any more reason for establishing the contents of the destroyed paper than if it had never existed?

In fact no such paper was ever a will; death without revocation was indispensably necessary for the legal consumation of that which had been only *moved* or initiated. And if the testator know of the destruction before his death, and when he could have made another if he chose, the thing thus *commenced* died with him and never had or could acquire the living power of a good statutory will.

3. But if I shall be adjudged wrong in both positions—that is, the inadmissibility of the bill of exceptions, and the error in overruling the fourth instruction—I think I have good ground to hope that the court will reverse the judgment. I apprehend that the court felt great difficulty in affirming the case in 3 *Ben. Monroe*. I think that the opinion itself shows this; and I think that had the new facts proved by W. Payne and Col. Steele appeared in that case, the court would have reversed instead of affirming. I can't see how those facts can be gotten over; they meet all the arguments and repel all the conclusions in the case in 3 *B. Monroe*. As to the effect of W. Steele's declarations, and as to the absence of motive to change his purpose or destroy the paper, and as to

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the want of any proof or fact opposing the effect of those declarations. And if the proven contents of such a paper could, on any proof, be legally established as a will when the testator, as in this case, knew that it was gone, and had the means of making another, I think I am authorized to say that the case cannot be found in which it was refused on such proof as that by Col. Steele and W. Payne, both of whom are men of high standing and of unquestioned and unquestionable credibility. The witnesses can't be doubted. They testify to the truth, and will and must be fully accredited.

4. The case of Calvin vs. Frazier, and many other cases, show, and upon grounds of obvious propriety, that persistence in a will once published must be shown to have continued as to the whole will; otherwise destruction operates as a revocation. Now in this case there is no pretense of proof, positive or presumptive, of presistence in all the provisions of the lost paper.

I have hopes, therefore, of final success, which I do believe is demanded by distributive justice, and by the philosophy and efficacy of our jurisprudence.

Robinson & Johnson for appellees—

The only question of any moment is upon the correctness of the opinion of the court in admitting to be read to the jury, the statement of the evidence on the probate of this will in the Circuit Court, contained in the bill of exceptions prepared and filed in that case. It was admitted under the 15th section of the statute of wills—2 *Statute Laws of Kentucky*, page 1544—which is as follows: "In all such trials by jury the certificate of the oaths of the witnesses, at the time of the first probate, shall be admitted as evidence, to have such weight as the jury thinks it deserves."

The "*trial by jury*" mentioned in this section is the trial provided for in the preceding sections, in which the contest is raised by a bill in chancery. The "cer-

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tificate of the *oaths* of the witnesses" means the certificate or certified statement on record of the *evidence* on oath of the witnesses. The mere certificate that a witness was *sworn*, without the *facts sworn to*, could not be evidence for any purpose. I presume, however, that it will not be contested by the opposite side that the word "oath" in that section does not mean the *things or facts stated on oath*. This word has a similar meaning in another section of the same statute, where provision is made for taking the deposition of a witness out of the state. The statement of the witness on oath or affirmation is called his "oath or affirmation," and a "certificate of his *oath* or *affirmation*" is made evidence.

In the argument in the Circuit Court, the attempt was made to confine the provision to the statement of the *subscribing* witnesses. But there is nothing in the language of the section so to confine it. In a great number of cases there are no *subscribing* witnesses. As in the cases of nuncupative wills, wills written altogether in the testators hand-writing, or wills of personal estate, or the subscribing witnesses may be dead. Nor is there any reason for confining it to subscribing witnesses. Those witnesses upon whose oaths the will was proven, are evidently the ones who are embraced by it. It was also contended that it was only intended to apply to those cases of *ex parte* and summary proof of a will, in which a few witnesses are examined, and whose testimony is briefly recited in the order of probate. I can see no reason for such a restriction. If an *ex parte* statement of a witness can be read, it seems to me much more proper, where there was a contest, and cross-examination by an opposing counsel. There is stronger evidence of its truth where it has been sifted by cross-examination, and there is much more confidence to be reposed in the correctness of the statement of the evidence when drawn up by counsel, corrected by opposing counsel, and finally corrected

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and certified by the judge and entered of record, than when stated by the clerk alone.

The probate of a will includes the whole proof by which a will was established, and although clerks often, in their statement of the probate, recited very briefly the proof given by each witness, and may perhaps omit some who are examined, yet a party would have the right of having the whole statement of the witnesses proving a will made in full, in the order of probate, and then certified by the signature of the judge to the orders. Here the full statement was made and certified by the signature of the judge, spread upon the record, and composes a part of the probate, as much as if it were recited again by the judge in the certificate or order of probate. It may be contended that only the proof of witnesses in the County Court was intended to be embraced: When the statute of wills was enacted there was no appeal to the Circuit Court—the case was carried directly to the Court of Appeals, where the witnesses were examined in person, and probate made. If the Court of Appeals admitted the will to record that court made the probate, and it would have been competent for the party offering the will to have had the testimony stated on the record in full, and such a statement would have been a certificate of the oaths of the witnesses on the *first* probate. In this case the *first* probate of will in contest was in the Circuit Court. The will established in the County Court was different from that established by the Circuit Court, and consequently it was in the Circuit Court *literally*, that the *first* probate was made. But the word "*first*" in that section is in contradistinction to the probate required to be made in the trial by jury, on the issue of will or no will. No matter through how many courts a will case may be carried by appeal or writ of error, if the will is established finally, is is but one case and one probate.

The probate of a will is in its nature a proceeding *in rem*, affecting and binding all persons, as much as

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a proceeding *in personam* is binding on those regularly parties to it. This conclusive effect of a probate is mitigated in some degree by the section permitting any person interested to file a bill to contest the probate in seven years if free of disability, or in the same time after the removal of disabilities in cases of infancy, coverture or lunacy. Under this clause a will may be contested fifty years after its probate, long after every particle of living evidence, even of hand-writing, had passed away. Were it not then for the provision of the 15th section wills could be set aside fifty years after they were fully proven, upon no other ground than that the witness had perished or his mind had become imbecile. To prevent this, the 15th section was added. Its object was to enable the devisees to protect the testimony of the probate, by causing the "oaths" or evidence of the witnesses to be certified by the court, and placed upon the record. The statute did not intend to restrict its operation to the mere formal parties contesting in the first instance. In contemplation of law all persons interested are parties to a proceeding *in rem*, and are bound by it; and testimony taken in a proceeding *in rem* can regularly be read against all interested, because they are in law parties; and if depositions were taken they could be read, by the general principles of law, without this provision, but as evidence in cases of probate is generally given orally in court, this provision allows the statements to be certified by the court, and the certificate read as evidence.

In the Revised Statutes this provision is changed and in some degree restricted. All the evidence delivered orally in court and spread on the record, and all depositions taken are allowed to be read if the attendance of the witness cannot be procured. It may be that this is a proper restriction, but it is certainly not contained in the old statute.

It so happens that this section has never received a judicial construction. I can find no case under it. The reason is, that generally wills have been attack-

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ed upon some *positive* evidence of the contestants, upon something *new* and not acted upon in the first probate. Here it was merely to have a new tribunal to act on the same evidence. To have a jury also to decide upon what the County Court, Circuit Court, and Court of Appeals had previously decided, with some little hope from the forgetfulness of some of the witnesses. In this case the importance of some of the evidence arose from the very *date* of the facts or declarations of the testator. It is a reasonable presumption that the witnesses after ten years could not remember a date. Many of the witnesses were dead, removed away, and scattered so as to be very difficult to find. But for this provision the contestants would get the benefit of all this on a re-trial. There was not a witness examined who had not been examined before, showing that it was not upon anything new or lately discovered, but simply to obtain the chances of a re-trial before another tribunal upon the same evidence, reduced and diminished by death, removal, or forgetfulness.

The instructions given by the court on behalf of the complainants are stronger than the principles of law as laid down by this court in the case of this will. The law was then fully discussed, and must certainly be regarded as the law in this will.

July 3.

Judge STURGEON delivered the opinion of the court.

William Steele, of Fayette county, died in October, 1842, childless and unmarried. Shortly thereafter D. L. Price and wife offered for probate, before the County Court of that county, his last will and testament, which, as they allege, was lost, and which they propose to establish as a lost will. Upon the testimony of witnesses the court established the will, and it was admitted to record. An appeal from the sentence of the County Court was taken to the Circuit Court, by the contesting heirs, and upon the trial of that appeal the will was again established, as it had been in the County Court, except that some mod-

ification of its provisions was then made. The testimony introduced upon the trial in the Circuit Court was placed upon the record by a bill of exceptions, and the case was brought up to this court, where the decision of the Circuit Court was affirmed. The opinion delivered in the case is reported in 5 *B. Monrue*, 58.

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Some of the heirs of William Steele, who were not parties to that controversy, afterwards instituted this suit in chancery, in the Fayette Circuit Court, contesting the validity of the will. An issue was made on this subject by the parties, on the trial of which the evidence contained in the bill of exceptions, that had been taken on the former trial in the Circuit Court, was offered on the part of Price and wife, and, although objected to by the complainants, was admitted by the court. The propriety of the decision of this question by the Circuit Court, is the principal matter presented for our consideration, in reviewing upon this writ of error the proceedings in the court below, the decree rendered therein having been in favor of the will.

By the 15th section of the act of 1797, (2 *Statute Law*, 1544.) it was enacted, that "In all trials by jury the certificate of the oaths of the witnesses at the time of the first probate shall be admitted as evidence, to have such weight as the jury shall think it deserves." It was under this provision of the statute that the evidence objected to was admitted by the Circuit Court.

The statute containing this section prescribes the mode of probate in the County Court, and the manner in which any person interested shall have a right, if that court has granted a certificate of probate, to appear within seven years afterwards and contest the validity of the will, by bill in chancery. And it is upon the trial of the issue which, under the provisions of the statute, is to be submitted to the decision of a jury, that the certificates of the oaths of the witnesses, at the time of the first probate, is to

A bill was filed to establish a lost will, and the will partially established. Subsequently other persons claiming to be heirs, and not parties to the first suit, filed their bill contesting the validity of the will as established. Held, that upon the trial of this 2nd case, it was proper to admit, as evidence, the testimony found in the record, of all such witnesses as were dead or whose testimony could not be had; but not to read the bill of exceptions

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containing the
testimony of
witnesses who
might again be
examined. *Sin-
gleton vs. Single-
ton, &c.* 8 B.
Monroe, 368.

be admitted as evidence. The probate referred to, and described in the statute as the first probate, is evidently the probate in the County Court. No probate in any other court is mentioned in the statute, and the object of the suit in chancery, which the statute authorizes, and in which the evidence is allowed to be used, is to avoid the effect of that probate.

In making a certificate of probate the common and uniform custom in the County Courts has been, as we believe, merely to state that the will had been proved by the oaths of certain witnesses, whose names were given. Their evidence was not stated in the certificate of probate, but only the fact that the execution of the will had been proved by them. The existence of this custom not only accounts for the peculiarity noticable in the statute, in allowing the certificate of the oaths of the witnesses to be admitted as evidence, instead of the facts proved by them at the time of the first probate, but it also demonstrates that it was the probate in the County Court only that was referred to in this part of the statute.

It is a fundamental and important principle of the law of evidence that a party shall have an opportunity to cross-examine the witness whose testimony is offered against him. This rule, which is material to the rights of every litigant, should not be departed from, except where the attainment of justice, and the necessity of the case require the adoption of a different principle. The probate of a will, it is true, is a proceeding *quasi in rem*, and in such proceedings the sentence of the court having jurisdiction is generally conclusive against all persons. This conclusive effect is, however, given to the judgment of the court, and not to the testimony. But the probate referred to in the statute is not conclusive on persons who are interested in the proceeding, but who are not parties to it; they are allowed to appear within seven years thereafter and contest the validity of the

will, notwithstanding such probate. The sentence of the court not being conclusive on them, the testimony given upon the probate can have such effect only, upon a subsequent trial, as is imparted to it by the statute. And as the statute evidently refers alone to the probate in the County Court; and as the admission of testimony which was given upon a former proceeding, to which the persons to be affected by it were not parties, is in direct violation of an important legal principle, this provision of the statute should not be enlarged, by construction, beyond its plain and natural import. It only embraces such evidence as shall be given in the County Court, upon the probate therein made, and not such as might be given in any other court, and no other should be admitted under the authority of the statute.

But as there is an identity of interest between the parties who are now contesting, and the parties who have heretofore contested the validity of the will, there is an evident propriety in imparting to the testimony delivered upon the former trial in the Circuit Court, the character of secondary evidence, and authorizing it to be used as such where any of the witnesses then examined cannot be produced on the present trial. This was the rule prescribed by this court in the case of *Singleton vs. Singleton, &c.*, 8 B. Monroc, 368, which was an analogous case. It is a rule necessary to prevent injustice, and peculiarly appropriate in such a proceeding as this. It has also the sanction of legislative approbation, having been made a statutory rule by the Revised Statutes, (page 700.) The statutory rule, it is true, does not apply in this case, which was pending at the time of its adoption, but it shows the opinion of the Legislature with respect to the justness and propriety of the rule itself.

The questions of law involved in the instructions given by the court to the jury, were discussed and decided by this court in the opinion delivered by it in 5 B. Monroc, 58. The law was expounded by the

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court below in substantial conformity with the principles settled in that opinion. The doctrines therein asserted we think are correct, and are not disposed to depart from them.

But for the error committed by the court, in admitting the contents of the bill of exceptions, which was taken upon the trial in the Circuit Court as evidence upon the trial in this case, the decree will have to be reversed, and a new trial awarded.

Wherefore, the decree is reversed, and cause remanded for a new trial, and further proceedings in conformity with this opinion.

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Upchurch vs. Upchurch.

Case 8.

APPEAL FROM WAYNE CIRCUIT.

1. The 5th section of chapter 106 of the Revised Statutes, is in substance a re enactment of the statute of 1797, (*Statute Law*, 1537,) in regard to the attestation of wills, under which it was held that the acknowledgment of the will by the testator in the presence of the witnesses, though written, and the testator's name subscribed by another, at a different time, was a sufficient publication." (*Stanks vs. Christopher*, 3 Mar., 144, and in *Cocran's Will Case*, 3 Bibb, 491.)
2. Though the statute demands that "the witnesses shall subscribe the will with their names, in the presence of the testator," a literal compliance has not been exacted, either under our statute or that of 29 Charles 2d, under which it has been held that marksmen were sufficient; and where one witness was unable to read or write another might write his name, and the witness attach his mark. (1 *Williams on Executors*, 79, 2d American edition.)
3. The object of the law in requiring subscription by witnesses is to insure identity; if the witnesses recognize the paper as the true paper which they attested, this satisfies the requisitions of the statute. (6 *Gratton's Virginia Reports*, 57.)

The facts of the case are stated in the opinion of the Court. *Rcp.*

E. L. Vanwinkle for appellant—

The sufficiency of the subscription of the testator and the subscribing witnesses, are the only questions presented in this case for the adjudication of the

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court. Upon the other points there is no controversy or doubt, and appellant insists that the subscription of the testator and the attesting witnesses are substantially in conformity with the requirements of the statute.

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From the testimony it appears that the testator had his will written, and sent for the witnesses, Redman and the two Keetons, and that, while in the full possession of his mental faculties, he made his mark to his signature, at the bottom of the will, in the presence of the witnesses, for the purpose of giving it effect as his last will and testament; and that the witness Redman, at the request of testator, and in his presence, subscribed his own name, in proper person, to the will, as a subscribing witness thereto, and that the other two witnesses, being unable to write, stood over Joseph Upchurch and caused him to write their names at the bottom of the will as subscribing witnesses thereto; that this was done in the presence of the testator, and at his request; that these two witnesses, after the writing of their names as subscribing witnesses, acknowledged said signatures as their own in the presence of the testator, and he approved of the same; and further, that some days after the testator caused the names of Moses and Shadrick to be inserted in one clause of the will. (said names having by mistake been omitted by the draftsman.) and after this change was made all of the witnesses were again called in, when the testator again acknowledged the paper as his last will in their presence, and requested them to again acknowledge their signatures as subscribing witnesses, which they did in his presence, &c.

The first question to be disposed of is the sufficiency of the testator's subscription. Our statute requires that the testator's name must be subscribed to the will, and if done by another it must appear that it was done in the presence of the testator, and by his direction; and moreover, that if not wholly written by himself the subscription *or will* must be ac-

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knowned in the presence of two credible witnesses. Now it may be insisted that the making of a mark by the testator, and his acknowledgment of the signature and will in the presence of the subscribing witnesses, are not sufficient unless it further appears that the name of the testator was subscribed for him in his presence, and by his direction. To this it may be said that the present statute upon the subject of wills is a literal transcript of the act of 1797. upon the same subject, (*see Morehead & Brown, 1538.*) except that the latter act does not provide expressly that an acknowledgment of the signature or will, by the testator, in the presence of two witnesses, shall be sufficient, which the former act does.

In construing the act of 1797, the Court of Appeals, in the case of *Cochran's Will, 3 Bibb, 495*, and *Shanks vs. Christopher, 3 Marshall, 146*, has decided that an acknowledgment, by the testator, of the will or signature, in the presence of the subscribing witness, is a sufficient compliance with the law, without any further proof that the name of the testator was signed to the will in his presence, and by his direction, the acknowledgment being regarded as sufficient evidence of the fact; and this construction of the act of 1797 is incorporated into the body of the present law, thereby expressly affirming the principle settled by the court in the above cases. Therefore, the only real changes in the Revised Statutes, upon this subject, are that the will, instead of being signed, must be subscribed, and that the subscription must be that of testator's name. Under the act of 29th Charles 2d, it was decided that the signing of another person's name, at the request of testator, was sufficient, if acknowledged by him—*see 1 Williams on Executors, and Greenleaf on Evidence*. The object of our late revision, in requiring the name of the testator to be subscribed, was no doubt done to avoid the effect of that construction. It is therefore apparent, from the facts of the case before the court, that the

proof of the subscription of the testator's name is amply sufficient, and up to the letter of the law.

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The only difficulty in establishing the will arises from the manner in which the witnesses subscribed and attested it.

The statute requires that the witnesses shall subscribe their names to the will in the presence of the testator. The statute of 29th Charles 2d contained a similar provision, and under that statute it was well established that marksmen are sufficient, and that one witness who subscribed might hold and guide the hand of the other, who could neither read nor write—see 1 *Williams on Executors*, 79, 3d American edition. Now the testimony in this case shows that two of the witnesses could not write, and that they stood over and directed Joseph Upchurch to subscribe their names to the will, as witnesses, which was done in the presence of witnesses and testator, and approved by him, and these acts were by the witnesses adopted as their own; therefore it is insisted, that by the said acts Cyrus and Joel Keeton become subscribing witnesses to the will of Thomas Upchurch to all intents and purposes. It is a well settled rule of law that an agent without a sealed authority cannot bind his principal by deed under seal; yet where the principal stands and directs another to sign his name to a sealed instrument, it becomes the deed of the principal as much so as if the agent had taken hold of, and guided the hand of the principal in the signing of the same, (see *Story on Agency*, pages 55 and 56, section 51,) where the following language is held: "And this very exception as to instruments under seal has an exception introduced into its generality, for although a person cannot ordinarily sign a deed for, and as the agent of another, without an authority given to him under seal, yet this is true only in the absence of the principal; for if the principal is present and verbally or impliedly authorizes the agent to fix his name to the deed, it becomes the deed of the principal, and it is deem-

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'ed, to all intents and purposes, as binding upon him
'as if he had personally sealed and executed it.
'The distinction may seem nice and refined, but it
'proceeds upon the ground that when the principal
'is present, the act of signing and sealing is to be
'deemed his personal act as much *as if he held the*
'*pen and another person guided his hand, and pressed on*
'*the seal.*'

If then the act in contemplation of law is as much that of the principal as if he held the pen and the agent guided his hand, although the principal never touched the deed or pen his personal presence giving it full effect, was not the subscription of the two Keetons by Joseph Upchurch, they being present and directing the act, as much their act as if Joseph Upchurch had held and guided the hand of each witness in writing their names as subscribing witnesses to the will? But suppose it be objected that the cases are not of the the same nature, that the signing of the deed is merely a mechanical act, and that a subscribing witness to a will must not only subscribe, but must attest the will—the one being a mechanical and the other a mental act. To this it may be answered that the mechanical act is done through another, which, in the nature of things, is easily done, but the attestation is done by the witness him-self, by an act of the mind. The attestation is complete without any mechanical act, and the subscription is also completed because the witnesses were personally present, and directed their names to be signed. Applying the principle in *Story on Agency, ante*, to the doctrine settled in *Williams on Executors, ante*, it follows as conclusively as a mathematical demonstration that the will of Thomas Upchurch was witnessed by three subscribing witnesses, and in his presence and at his request.

But another view. The will and subscriptions of the witnesses being made, and afterwards acknowledged by them, are not the acknowledgments, according to the principles of the case of *Wiley's will*,

1 *B. Monroe*, 115, sufficient to establish the will, although the rule was different in the courts of England? (*See Williams on Executors*, page 77, vol. 1, 3rd edition.)

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It has been decided time and again that the object of the law in requiring an attested witness to subscribe the will, is to secure the identification of the paper as the will of the testator, and that a witness who cannot write may subscribe by mark, or having his hand guided by another in writing his name. Now how can it be possible that this object is more satisfactorily accomplished by an ignorant man having his hand guided by another in subscribing his name, than by standing over another and directing him to write his name for him. Would the witness be enabled by the difference of the process to identify the first subscription more readily than the latter? Surely not. If the one is a good subscription, the other must also be good, as the object and policy of the law is as fully subserved in the one case as the other. In this case the paper is identified in a manner that leaves no doubt, by the witnesses Redman and Keeton: the first swearing positively to his signature, the other pointing out the one made for him, and recognizing it upon the trial, &c. Wherefore, appellant thinks the will ought to be established.

F. P. Stone, for appellee—

This case raises the single question, "can a will be established under our statute without the names of two subscribing witnesses having been actually placed and written by themselves, as attesting and subscribing witnesses to the will?" In this case the names of two of the witnesses were written by one of the devisees under the will, and no mark was made by either of them but a simple oral acknowledgment, and recognition of the act of subscribing as their act. Does the language of the Revised Statutes give to the subscribing witnesses the power of acting through the agency of another? If the revi-

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ners, or the Legislature who adopted it, had so intended, it would have been easy, by the addition of a few words, to have made such intention obvious. In reference to the testator, his power to subscribe by another is expressed. If they had intended that the witnesses might subscribe by another, it is reasonable to suppose it would have been so expressed. The plain literal meaning of the words "who shall subscribe the will with their names," is that they themselves shall actually subscribe or write their names, by an actual literal physical writing or marking done by themselves. The maxim that 'that which a man does by another he does by himself,' grew out of the relations livingmen bear to each other. It is a rule applicable to trade and commerce among men, and does not, and was not intended to apply to anything connected with the making and publication of a will, which does not take effect by delivery as deeds do, but takes effect only upon the death of the testator. The reason why the subscribing witnesses are required to subscribe their own names, or make their own marks in the presence of the testator, is to prevent the fraudulent substitution of another paper instead of the one intended by the testator to be published as his will. It is for the more certain and sure identification of the paper. The law itself has fixed the mode of *identification* of the *paper*. It is the actual manual subscribing of the names of the witnesses by *themselves*, and no authority conferred by them upon another, and no actual oral statement by them as to the general identity of the paper, can be equivalent to the actual subscription by themselves of their own names.

To permit another to sign for them, or one to sign for another, or the principal devisee to sign for both, would be to defeat the purpose to be attained by the rule. The case before the court presents, in a most striking manner, the importance of adhering to the rule for the sake of the object of its original formation.

One of the Upchurchs, the principal devisee under the will, wrote the will, wrote the names of the testator, and the names of two of the subscribing witnesses. How easy for him, or any man in such a case, after the testator's death, to substitute a different paper for the one intended by the testator to be his will. Upon examination of the English statutes upon this subject, it will be seen that in relation to the subscription by the attesting witnesses, the language employed does not in its import differ from the language of our Revised Statutes. See *Williams on Executors*, 1st vol., 3rd American edition, pages 75 to 78, inclusive; see the case of *Murre vs. King*, referred to on the 79th page, as clearly showing that a mere acknowledgment of subscription by a witness, without an actual signing, is insufficient. See on 78th page the note D, in which the goods of White are referred to, and where it is said directly, "that one witness cannot subscribe for another." If one witness cannot subscribe for another, can a devisee subscribe for the testator and the witnesses.

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J. M. Harlan, on the same side—

We have been unable to find any adjudged case which decides the exact question which is presented in this record, which is, whether there is a sufficient legal subscription by a witness to a will, when being unable to read or write he directs a bystander to write his name, and he acknowledges the subscription to be his in the presence of the testator—no mark or sign being made by the witness, and there being no witness to the signature of the witness.

Such a subscription, if allowed to be sufficient, would, in our opinion, defeat the whole policy of the law in reference to the identification of wills. The provision of the law bearing upon this subject is in *Revised Statutes*, page 694, 5th section. It is there provided that where the will is not wholly written by the testator, the subscription shall be made or the will acknowledged by him in the presence of at least

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two credible witnesses, *who shall subscribe their names* in the presence of the testator. This provision of the law is substantially the same as the law in existence previous to the adoption of the Revised Statutes.

The object of this provision of the law was to *identify* the will clearly, to prevent the fraudulent substitution of a forged will in the place of the *real* one. Where, therefore, the witness cannot *read or write*, and another writes his name by his request, it is possible that the provision which requires the witnesses *to subscribe their names* will be *substantially* complied with if the witness makes his *mark* or *sign*. We grant that a *mark* is not *conclusive* evidence to the witness himself, that his name, as subscribed to a will, is put there according to his *direction*; yet, in the absence of ability to read or write, it is the best evidence which human ingenuity can furnish of the fact.

In this case there is no mark. The names of all of the witnesses except one are wholly written by a *devisee* under the will. It is true that one of those witnesses was able to point out, on the trial below, which was his name. This he might have done, and no doubt did do, *because he remembered that it was written first or second in the list of witnesses*. Certainly he did not do so from any knowledge of the formation of letters, or because his name, as written, always looked in a particular way. Suppose the devisee had written "John Doe," instead of "Joel Keeton," and "Richard Roe," instead of "Cyrus Keeton," and the Keetons had been told by Upchurch that *their* names had been written, would they have known any better? If not, what then does his being able to point it out on the trial amount to? Might not his name have been pointed out to him before trial?

The strict letter of the law requires that the subscribing witnesses shall write *their own names*. The *spirit* of the law may admit of a *mark* where the witness cannot read or write. But does not its letter,

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and spirit, and reason, and sound policy forbid that both of these safe-guards against imposition and fraud should be overthrown, and a *devisee* write the will, and write the names of the witnesses? Any other construction of the law would throw open a wide door for rascality and forgery, and render the identification of wills a task too easily accomplished.

An affirmance is asked.

Judge ~~Switz~~ delivered the opinion of the Court.

July 7.

On the 18th of July, 1853, a few months before his death, Thomas Upchurch procured his brother Joseph to write his will, and subscribe his name thereto. On the same day, Redman and the two Keetons, Cyrus and Joel, were requested by the testator to subscribe their names as witnesses to said will. The paper was produced by the testator with his name already subscribed, to which he affixed his mark, and it was then acknowledged by him, in the presence of Redman and the Keetons, to be his last will and testament. Redman, thereupon, subscribed his name as a witness, but the other two not being able to read nor write requested Joseph Upchurch, the brother, who was a devisee, and by whom the will had been written, to subscribe their names for them. This he did in their presence, and they acknowledged their names thus written, and adopted the signatures as their own. This all took place at the same time and place, and in the presence of the witnesses and testator, who again acknowledged the will to be his.

After the death of the testator, upon proof of the foregoing facts by the three witnesses, who identified the will and proved the sanity of the testator, the will was admitted to probate by the County Court.

Upon an appeal to the Circuit Court the order admitting the will to probate was reversed, and from that judgment, the devisees have appealed to this court.

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This case comes under the operation of the *Revised Statutes*, chap. 106, sec. 5, 694, and presents for consideration the sufficiency of the publication of the will, and necessarily the mode and sufficiency of the subscription of the names of the witnesses.

The section referred to is a substantial re-enactment of the act of 1797. (*Stat. Laws*, 1537.) Its requisitions being similar in import and substance, if not so in phraseology, there is not much difficulty in determining that the acknowledgment of a will by the testator, in the presence of the witnesses, though written and his name subscribed by another at another time, was a sufficient publication. This was held a compliance with the statute in *Shanks vs. Christopher*, 3 Mar. 144, and in *Cochran's Will Case*, 3 Bibb, 491.

But were the witnesses, whose names were written by another, subscribing witnesses within the meaning and purview of the statute? In the opinion of a majority of this court they were.

The statute demands that the witnesses shall subscribe the will with their names in the presence of the testator.

The same requisition is contained in the statute of 29 Charles 2nd. Yet a literal compliance with its requisitions was not exacted, for it was held that marksmen were sufficient, and that where persons were unable to read or write, their names might be written by others, and marks attached by themselves; and, also, that one witness might hold and guide the hand of another who could not write, 1 *Williamson Executors*. 79, 3d An. cd.; and in a note subjoined, on the same page, it is said, "that the mark of a witness, though affixed to a wrong surname, was deemed sufficient."

In every adjudication of this court involving the publication and attestation of wills from *Cochran's Will Case supra* down, a substantial rather than a literal compliance with the statute has been demanded; and if its object and intent were reached with-

1. The 5th sec. of chapter 106 of the *Revised Statutes* is in substance a re-enactment of the statute of 1797, (*Statute Law*, 1537,) in regard to the attestation of wills, under which it was held "that the acknowledgment of the will, by the testator, in the presence of the witnesses, tho' written, and the testator's name subscribed by another at a different time, was sufficient publication." (*Shanks vs. Christopher*, 3 Marshall, 144, and in *Cochran's Will Case*, 3 Bibb, 491.)

2. Though the statute demands that the "witnesses shall subscribe the will with their names in the presence of the testator," a literal compliance has not been exacted either under our statute or that of 29 Charles 2d, under which it has been held that marksmen were sufficient, and where one witness was unable to read or write another might write his

out a violation of its express language, that is all that has been required.

In *Swift and Wife vs. Wiley*, 1 Ben. Mon., 117, where the question was as to the time when the subscription should be made, and not as to the manner of subscribing, and in which the proper distinction is taken between a subscription and an attestation, it is said that the object of the statute in requiring a subscription is to insure identity, and prevent the fraudulent substitution of another document.

Here the witnesses did not write their names, but they were written for them, at their request and in their presence, and that of the testator and the other subscribing witnesses, and when thus written adopted by them at the same time. Afterwards on the trial, their names were recognized, and the paper identified by them as the one they had attested in the presence of the testator and other witnesses.

This writing of their names by another under such circumstances should, in our opinion, for every purpose contemplated by the law, be regarded as their own act, as much so as if it had been a deed to which they were subscribed, or as if their hands had been held and guided by another.

It furnishes as much assurance of identity as the making of a mark, which, as already shown, has been deemed sufficient by other courts, under a like statute, and the facts disclosed by the witnesses reasonably preclude the possibility of there having been a fraudulent substitution of another paper.

A literal adherence to the words of the statute would operate harshly, and exclude all persons unable to write their names, as witnesses to wills, however worthy of credence. A more liberal construction will as effectually accomplish the ends of the statute, and not violate its language, nor render invalid a paper proved, as we think this is, beyond all reasonable doubt, to be the last will of the testator by the requisite number of witnesses, whose names were subscribed, though by another, in their pre-

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name and the witness attach his mark. (1 *Williams on Executors*, 79, 3d American edition.)

3. The object of the law in requiring subscription, by witnesses, is to insure identity. If the witnesses recognize the paper as the true paper which they attested, this satisfies the requisitions of the statute. (6 *Gratton's Virginia Reports*, 57.)

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sence and at their request. In this conclusion, we are supported by direct authority in a case arising under the statutes of Virginia respecting wills, where the same mode of authentication is required. (*6th Gratton's Report*, 57.)

We are of opinion, therefore, that the Circuit Court erred in reversing the order of the County Court, admitting the will to probate.

The judgment is reversed, and cause remanded, with directions to the court below to affirm the order of the County Court, and for other necessary orders.

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Case 9.

APPEAL FROM OWEN CIRCUIT.

The widow of a husband who holds a title bond to land, but who disposes of it during the coverture, is not entitled to dower in the land, though the husband may receive a conveyance of the legal title after he has parted with the title bond—he held the legal title in trust for his assignee.

Geo. W. Craddock, for appellant—

Argued, that according to the petition and deeds exhibited, the appellant has shown a clear right to dower in the property described. The facts relied upon in the answer of Ford, are no bar to the claim of dower, if proved; but they are not proved. The execution of the bond from Brown to Green is not proved; and it makes no reference to the title being in another person, or that O'Neal ever had anything to do with the property; it recites that the property was formerly owned by S. Calvert.

But if the bond was executed, it is contended that the merits of the case is with the plaintiff.

The plaintiff was married to O'Neal in January, 1836, and was the wife of O'Neal at the time he purchased the property, and held the bond of Noel and

Russell for the title. He sold and gave the possession to Brown. Though Ford does not admit, yet he does not deny O'Neal's possession. After giving the history of the case, he says, "James O'Neil never had such a title or possession of the property as also states that James O'Neal sold the property "by would entitle his widow to dower therein;" but he title bond to Brown, and gave him possession thereof." The statement that O'Neal never had such a possession as entitled the widow to dower, is a conclusion of law, and not the denial of a fact.

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It has been decided by this court, that when the husband holds bond for title, and dies, his wife is entitled to dower, and that too, notwithstanding all the purchase money has not been paid. (*Brewer vs. Vansardale*, 6 Dana, 204; *Stephens vs. Smith*, 4 J. J. Mar., 67; *Bailey and Wife vs. Duncan*, 4 Mon., 260.)

In the case of *Hamilton vs. Hughes*, 6 J. J. Mar., 181, where the husband held a bond for a title, and assigned it to another before his death, it was held that the wife of the assignor was not entitled to dower. This decision is based upon two reasons, neither of which apply to this case. 1. That the husband holding only an equity, he could not dispose of it so as to defeat the right of the wife to dower, except by deed in which the wife might unite. 2. That by the statute of 1812, title bonds are made assignable, and the obvious intention of the act was to invest the assignee with the entire interest of the obligee, which would fail if the wife's right of dower could not be defeated.

The force of the reason given by the court in *Hamilton* against *Hughes* and wife, is not perceived. In the case of *Bailey and wife vs. Duncan*, 4 Mon., 262, it was decided that the fourteenth section of the act of 1796, (1 *Statute Law*, 444,) gave the wife right of dower in lands, as fully and completely in all constructive trusts, as in express trusts; and it was held in that case, that when the husband held a bond, and was entitled to a conveyance of the legal title, his

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wife was entitled to dower, as fully as if the title had been vested in a trustee expressly for the benefit of the husband.

If the husband, previously to coverture, assign a title bond, he remains but a trustee holding the title for the benefit of the assignee. (*Dean's heirs vs. Mitchell*, 4 J. J. Mar., 451; *Ib.* 64.) The case of *Hamilton vs. Hughes*, 6 J. J. Marshall, is in opposition, as is supposed, to the two cases in 4 J. J. Marshall, *supra*. It is insisted that by the act of 1812 it was not intended to deprive the wife of a right to dower in lands held by the husband by bond.

No brief for appellee.

July 9.

Chief Justice MARSHALL delivered the opinion of the Court.

This petition seeks to recover dower as the right of Mrs. Heed, in an improved lot in the town of New Liberty, of which the plaintiffs state that O'Neal, the former husband of Mrs. Heed, was *seized* during the coverture. They exhibit two deeds to him from Noel, &c., dated in 1840 and in 1846; the last being a mere confirmation of the first, and allege that O'Neal sold the lot to John T. Brown, who sold to P. and E. H. Green, under whom the defendants hold it in possession. The defense as set out in the answer is, that O'Neal purchased, by executory contract, from Noel, and afterwards in January, 1838, sold, by executory contract, to Brown, who afterwards in August, 1838, sold in the same way to P. and E. H. Green, who built on it a large brick house; that one of the notes of the Greens for the purchase money being in the hands of one Lindsey, as assignee, he brought suit to subject the lot to its payment; that during the progress of that suit, and in order to effectuate its objects, the legal title was, in 1840, conveyed by Noel, &c., to O'Neal, who held their bond for it; and that a sale was decreed, and actually took place from the purchasers, at which the defendant derived title. The bond from O'Neal to Brown, and from him to the Greens, and the decretal sale

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are referred to as on file in the suit above named ; and an order was made that the clerk should transfer them to this case. A bond purporting to be from Brown to the Greens, bearing date in August, 1838, and the decree of sale in the case of Lindsey against the Greens are in the record, but the clerk certifies that the bond from O'Neil to Brown is not among the papers. It is proved, however, that there was among the papers of the suit of Lindsey against the Greens, a paper purporting to be such a bond, and which among all the parties to that suit was received as genuine, but which cannot now be found. But in addition to the statement of the petition, that there was a sale from O'Neal to Brown, and from Brown to the Greens, the deeds exhibited by the plaintiffs furnish evidence that the premises conveyed, were, in 1840, in the occupation of the Greens ; and although the defendants have not made out their case very clearly by proof, we think it may be fairly assumed upon the pleadings and exhibits that O'Neal had sold to Brown before the date of Brown's bond to the Greens, and before O'Neal obtained the first deed from Noel, in 1840. Having then no legal title, he of course sold but an equity to Brown, and as may be presumed, sold by executory contract, and gave his own bond for title, there being no suggestion that he assigned the bond on Noel. His acceptance of the deed of 1840, authorizes the inference that he had not the legal title before the date of that deed ; and we assume that having only a title bond, or equity to the lot, he sold it to Brown, who sold it to the Greens before O'Neal acquired the legal title.

It follows that when O'Neal acquired the legal title, whether by the deed of 1840, or by that of 1846, he held it in trust, either for his own vendee, Brown, or for the Greens, who were in possession as the vendees of Brown. In either case he had not, by virtue of the legal title then acquired, any such beneficial interest or seizin, as entitled his widow to dower on his subsequent death. He held the title merely as

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gal title after he
has parted with
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trustee, and for the purpose of conveying it to another who was entitled to it by contract with him, and to whom he was bound to convey. The wife of a trustee is not entitled to dower in the estate held by her husband in trust for others; and the claim of dower rests in this case solely upon the question, whether as her husband had an equity in the land by title bond, during the coverture, but with which he had parted before his death by selling the land to another, his widow was entitled to be endowed of, or in that equity, notwithstanding its transfer by her husband. This question has been elaborately argued on the part of the counsel for the plaintiffs, whose claim was denied by the Circuit Court, and our attention has been called particularly to the cases of *Baily and wife vs. Duncan's heirs*, 4 Mon., 256, and of *Hamilton vs. Hughes*, 6 J. J. Mar., 581. The former is referred to as giving, upon solid reasons, a construction to the fourteenth section of the act of 1796, for regulating conveyances, (*Stat. Law*, 444,) which attaches the potential right of dower upon the equitable title of the husband, evidenced by a bond held during the coverture, for conveyance of the legal title, and that having once attached, it can only be divested in the mode pointed out for the relinquishment of dower in other cases, and cannot be defeated by the mere act of the husband; and it is said that the case of *Hamilton vs. Hughes*, which denies the right of dower where the husband has transferred his equitable claim upon the legal title, presents no satisfactory reason for the limitation which it places on the right.

It is to be observed, however, that in the first of these cases, the precise question stated and decided by the court was, whether the wife was entitled to be endowed of land to which the husband had the equitable title by bond at the time of his death; and, although, in deciding this question, the court construes the fourteenth section as embracing not only cases in which the trust for the husband is evidenced

by the deed vesting the legal title, but those also, in which the husband holds a bond, which in equity makes the holder of the title a trustee for him, and thus brings the case within the words of the statute, giving dower in lands of which another is seized during the coverture for the use of the husband, this construction, by which the statute is made to embrace trusts, resulting from executory contracts, is rather assumed than demonstrated, and it would not be very easy to reconcile the construction by which such trusts are included in the fourteenth section, with that which excludes them from the thirteenth section, subjecting estates held in trust to the like debts and charges of the person for whose benefit they are holden, as if he owned the like interest in the thing itself, which he owns in the uses or trusts thereof. Yet the interest held by title bond only has been uniformly decided not to be subject to execution.

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In the case of *Hamilton vs. Hughes*, the court evidently disapproves of the broad construction which had been given to the statute in the previous case referred to. But deferring to the authority of that case upon the precise question presented by the record, and decided by the court, that is, upon the right of the wife in case the husband dies without having divested himself of his equity, the court in *Hamilton vs. Hughes*, goes on to show the inconvenience and evil consequences of attaching the right of dower inseparably to a title by executory contract, evidenced by a private paper not required to be recorded, and which, under the statute of assignments, papers from hand to hand by indorsement and delivery, or may be transferred by another writing, and upon which, when it comes to the hands of the last holder, there may be two or ten claims of dower to which his interest is subject. And it is intimated, as a further illustration, that these bonds being assignable by the statute, it could not have been intended that in order to perfect the right of the as-

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signee, there should be a formal deed from the assignor and his wife, regularly acknowledged, authenticated, and recorded, as in conveyances of the legal title. Such a requisition would certainly change materially the course of dealing in title bonds.

It may be, that an adherence to both of these decisions may produce anomaly in the law of dower as applicable to equitable interests in land, evidenced by executory contracts. But we think the reasons given in the case of *Hamilton vs. Hughes*, against admitting the right of dower as attaching permanently to such equities whenever acquired during coverture, so as only to be divested by deed and formal relinquishments, are of great moment; and the decisions, upon both points, that is in favor of the right of dower, if the husband be entitled to the equity at the time of his death, and against it if he has previously sold and transferred it, or divested himself of it, (in good faith,) having been followed, and having become a rule of property, we do not feel at liberty to depart from either. If there be an error in either, or if either be contrary to justice or good policy, which the court does not perceive, the legislative department can easily apply the corrective. It has been said that the case of *Hamilton vs. Hughes* stands alone. But even if there were no other reported case maintaining the same principle, this, instead of showing that it was unsatisfactory, and had been repudiated, would, in the absence of any case overruling it, rather show that the rule established by it had been followed without question. We find, however, that in the case of *Lawson vs. Morton*, 6 Dana, 472, the principle is recognized and approved, that though the wife may be endowed in a trust or equitable interest held by her husband at his death, yet if he has parted with his beneficial interest prior to his death, the fourteenth section of the act referred to should not be so construed as to entitle her to dower therein; and we are satisfied that such has since been uniformly regarded as the law by this court.

Wherefore, the judgment dismissing the petition is affirmed.

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Case 10.

APPEAL FROM MUHLENBURG CIRCUIT.

PET. EQ.

1. The 10th section of the act of 1815, authorizing the issue of Kentucky land warrants, does not declare a patent issued on such warrants to be *void*, but only declares all titles founded upon surveys theretofore made, which, by the laws at the time being, were authorized to be made, shall be deemed *superior* to surveys made on the Kentucky land warrant obtained by virtue of said act, &c.
2. The statute of limitation of 1809, of seven years, is a protection to one holding under a Kentucky land warrant, who has been seven years in possession before suit, unless the person claiming has labored under some of the disabilities mentioned in the statute.— (*Ashbrook vs. Quarles' heirs, ante.*)
3. One disability cannot be added to another, as coverture to infancy, to save the rights of a party against the operation of the statute of limitations of 1809. It is the duty of a party claiming the benefit of the saving in a statute of limitations, to show the facts giving that protection.
4. The statute of 1809 protects the right of all, where part of the persons to whom the title accrues are infants, until all are of full age.
5. Seven years possession, with title, is a protection under the act of 1809, against an equitable as well as a legal title holder.

The facts of the case are stated in the opinion of the Court. *Rep.*

John H. McHenry for appellant—

The petition in this case was filed by Clark to recover a tract of land in the possession of Jones. The facts present the case in a concise form, but a short statement here may make them more easily comprehended.

Clark claims under the will of his brother, Gilbert Clark, who claimed, by sheriff's deed, the interest of the heirs of Samuel H. Earle, one of the patentees, and a division between him and the heirs of James Hunter, the other patentee, and a commissioner's deed direct to David Clark.

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The history of plaintiff's claim is as follows :

A certificate for what is usually termed a head-right claim, was granted by the County Court of Muhlenburg county for the land, dated 25th March, 1801, to Peter Shull. Shull assigned to Leonard Storm, and the land was surveyed in the name of Storm November 2d, 1801. It was entered by him for payment by installments ; the first installment was paid, and the land sold for the non-payment of the second installment, and bought by Samuel H. Earle, who assigned one half to James Hunter, and a patent issued to Hunter and Earle on the 24th of July, 1843. At the date of the patent, and up to the present time, a part of the heirs of Hunter, and part of the heirs of Earle, were infants and married women. The deed from the sheriff to Gilbert Clark bears date 29th March, 1846 ; the sheriff's sale was 27th October, 1845.

The will of Gilbert Clark is dated 24th August, 1850, and was admitted to record October term, 1850, of Muhlenburg County Court ; the commissioner's deed to David Clark, conveying the interest of Hunter's heirs, bears date the 24th of March, 1853. This suit was commenced 28th July, 1853.

The defendant claims under a patent issued by virtue of a Treasury warrant patent to Henry Storm, dated Jan. 6, 1820, and a deed from the patentee to him, (Jones,) dated on the 29th of December, 1834—this, by mistake of the clerk, is omitted in the record, but the agreed case shows its date, and the deed may therefore be considered as in the record.

Under this patent and deed there has been a continuous possession, and actual settlement by defendant and Bailey, from whom he bought, from 1828 up to this time.

Upon this state of facts the plaintiff contends that the judgment of the court should have been for him.

The patent to Henry Storm is void by the 10th section of the act authorizing Treasury warrant claims to be patented—see *Statute Law*, vol. 2, page —. By

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this section all such patents are expressly declared void so far as they interfere with any entry, survey, or patent which, by the law, was authorized to be made, notwithstanding such survey may not be made conformably to entry. In this case the certificate or entry and survey are all shown, and are in conformity to law, proving that they were authorized by law to be made at the time they were made. The defendant's patent is therefore void as to plaintiff's claim.

But if not absolutely void it is manifestly inferior to the patent under which plaintiff claims title. No limitation would run against the claim until the date of plaintiff's patent. (*Higginbotham vs. Fishback*, 1 A. K. Marshall, 506; *Clay vs. Miller*, 3 Monroe, 147; *Robinson vs. Neal*, 5 Monroe, 213; *Ring vs. Gray*, 6 B. Monroe, 272; 2 A. K. Marshall, 570; 4 Bibb, 554.)

At the date of the patent, which is, in fact, the commencement of the cause of action under the plaintiff's patent, a part of the heirs of Hunter, and part of the heirs of Earle, were married women, and remain so at the present time. Mrs. Reed, a daughter of Hunter, died in 1841, leaving all her children under twenty-one, and some of them are so yet. A portion of the heirs being infants and married women, when their right of action accrued, the seven years' limitation law would not run against any until the title was united in the plaintiff, (Clark,) by commissioner's deed, in 1853, a short time before the commencement of this suit—see *Mays' heirs vs. Bennett*, 4 Littell, 311 to 314. Other cases upon this point might be referred to, but I will not trouble the court with them.

But I conceive that no limitation short of twenty years after the date of plaintiff's grant, can avail the defendant in this case—his patent is absolutely void under the 10th section of the act of 1815, before cited. To prove this position the case of *Dallam vs. Handley*, 2 A. K. Marshall, 418, is referred to. The honorable Judge who decided this cause cited this

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case as proving the superiority of defendant's title; to me it proves directly the reverse. The contest then was between a claim which had been *forfeited to the state* for the non-payment of the *first* installment, and an actual settler under a Treasury warrant claim. The court there decide, that owing to the peculiar provisions of the law as it then stood, authorizing forfeited lands to be redeemed, that the claim of an actual settler should prevail against one upon which *nothing had been paid*—which had been forfeited to the state for the non-payment of the first installment—which had been redeemed upon conditions, one of which was, that it should not prevail against an actual settlement, or any other claim. In the present case the plaintiff's claim was not forfeited, but *sold*, by the state, for the non-payment of the *second* installment, and under the express *condition*, as we understand the law, that no Treasury warrant claim should prevail against it. A particular examination of that case is respectfully requested, and a comparison of the facts with those of the present case, and we confidently rely that the law is in our favor, and that the cause must be reversed, and a judgment directed to be entered for the plaintiff—if not for the whole, at least for the half conveyed by the commissioner from Hunter's heirs.

July 10.

Judge CRENSHAW delivered the opinion of the Court.

A certificate upon an entry was granted, by the County Court of Muhlenburg county, to Peter Shull, in March, 1801, and a survey was made of the land upon this certificate in 1804; and the second installment of the state price being unpaid, the land was exposed to sale for this installment, and was purchased by Samuel H. Earle, who transferred one half thereof to James Hunter; and the state price being paid, a patent for the land was issued to Earle and Hunter in July, 1843, and this patent covers the land in controversy; and a title to the land appears to have been regularly derived to the plaintiff from

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the patentees. But neither Hunter nor Earle, nor any one under them, has ever been in possession of the land; it was admitted that the defendant was in possession thereof.

The defendant claims the land in controversy under a patent to Henry Storm, granted in January, 1820, upon a Land Office warrant. Storm sold the land in 1828 to Thomas Bailey, by written contract, and Bailey, the same year, took possession, and resided on the land until 1833 or 1834, when he sold to the defendant, who took immediate possession before Bailey left, and has resided on the land ever since; and he and Bailey both claim to the entire boundary of Storm's patent, and the defendant relies on the superiority of his title, and the statute of limitations.

The plaintiff's is a head-right claim, and that of the defendant is a Treasury warrant claim. The entry and survey under which the plaintiff claims date back as far as 1801 and 1804, though the patent under which he claims was not issued until the year 1843. The patent of Storm, under which the defendant claims, was issued in the year 1820, and is oldest. But the 10th section of an act of 1815, for appropriating the vacant lands of this commonwealth, by Treasury warrants, enacts that all entries theretofore made, all titles founded upon surveys theretofore made, which, by the laws at the time being, were authorized to be made, shall be deemed superior to surveys made upon warrants obtained by virtue of said act of 1815, notwithstanding any alleged vagueness in the entries or certificates on which surveys were founded, and notwithstanding such surveys may not be made conformably to entry; and that no lands shall be subject to appropriation under the provisions of said act of 1815, that hath reverted to the commonwealth by escheat, or for the non-payment of the tax or taxes due thereon, or for a failure to list the same for taxation, or for any forfeiture that may have happened from a failure to pay the install-

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ment or installments due thereon prior to said act; and that no lands should be appropriated by said act to which the Indian claim was not extinguished. And it is insisted, that by virtue of this 10th section of the act of 1815, the title of the plaintiff is superior to that of the defendant, notwithstanding the patent under which the defendant claims is the oldest. But if it were conceded, that by virtue of this 10th section of the act of 1815, the title of the plaintiff might be regarded as superior, although his patent is the youngest, yet we apprehend that this superiority alone would not enable the plaintiff to recover in this suit, unless the patent under which the defendant claims is *void*, or unless, if it be valid, the defendant has failed to bring himself within the protection of the act of 1809, to compel the speedy adjustment of land claims. (*2d Statute Law*, 1441.)

1. The 10th section of the act of 1815, authorizing the issue of Kentucky land warrants, does not declare a patent issued on such warrants to be void, but only declares all titles founded upon surveys theretofore made, which by the laws at the time being were authorized to be made, shall be deemed *superior* to surveys made on the Kentucky land warrant, obtained by virtue of said act, &c.

2. The statute of limitations of 1809, of seven years, is a protection to one holding under a Kentucky land warrant, who has been 7 years in possession before suit, un-

We remember but two states of case in which the courts are authorized to pronounce a patent *void*. One is, where the Legislature have declared that the patent shall be *void*, if issued in contravention of specified provision; and the other is, where they have declared that the patent shall be deemed *fraudulent*, if issued under similar circumstances. The tenth section of the act of 1815, *supra*, does not declare a patent *void* or *fraudulent*, if issued under the circumstances therein mentioned, but only declares, in substance, that surveys upon land office warrants shall be inferior to all entries theretofore made, and all titles founded upon surveys theretofore made, &c.

The patent to Storm, theretofore, under which the defendant claim is not *void*, whether it be inferior to the title of the plaintiff or not. Consequently the defendant has shown himself invested with a connected title, deducible of record from the commonwealth; and has manifested by the proof, or admissions in the record, that he, and those under whom he claims, have been in the continued adverse possession of the land by actual *pedis possessio*, not only for seven years next before the commencement of this

suit, but ever since the year, 1828. Under such a state of facts, the statute of 1809 declares that no action at law, bill in equity, or other process, shall be commenced, or sued out, by any person or persons, claiming under, or by an adverse interfering entry, survey, or patent, whereby to recover the title or possession from him or her who shall have so continued in possession for seven years next preceding any such suit or action. But it is provided in the fourth section of the same act, that the limitation prescribed therein shall not extend to infants, *femes covert*, &c., but such persons shall be at liberty to institute such suits as are meant to be limited by the act, at any time within seven years after their respective disabilities are removed, &c.; and it remains, that we enquire whether by anything developed in this controversy, the right of the plaintiff to sue, when he did, was saved by any of the disabilities mentioned in said fourth section. No disabilities are insisted on, except those of infancy and coverture.

Earle, one of the patentees under whom the plaintiff claims, died in 1823, leaving three daughters, Leonora, Nancy, and Selina, and a son was born of his wife after his death. Leonora was born in 1814, and married Berry in 1833, and died about the year 1845, leaving ten children, all minors at the commencement of the suit. It does not appear when Nancy and Selina were born, but they were married about the year 1842. Nancy married Oates, who died in 1854, and Selina married High, and she and her husband are still living; and the son is also still alive.

Hunter, the other joint patentee with Earle, died more than twenty years ago, leaving four children—two sons and two daughters—one of the daughters married Reid, twenty-five years ago, and died in June, 1841, leaving eight children, all infants, and one is still an infant. The other daughter married about the year 1850, and she and her husband are still alive. The ages of these two different sets of

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less the person claiming has labored under some of the disabilities mentioned in the statute. (*Ashbrook vs. Quarles' heirs, ante.*)

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children cannot be ascertained with precision from anything in the record. But enough is made known to ascertain whether, by virtue of their infancy or coverture, the right of suit was saved to the plaintiff at the time of its institution.

Earle, as we have stated, died in 1823, leaving three daughters, and a son was born after his death. His children appear to have been minors when the adversary possession commenced in 1828, and the savings of the statute were then operating in their favor upon the ground of infancy; and they must all have attained majority in the year 1844, and so far as the infancy of these children is relied upon as saving the right of action, the suit ought to have been brought within seven years from the latter period, which was early in the year 1851, and the suit was not commenced till July, 1853. So that by the infancy of Earle's children, the plaintiff did not bring himself within the savings of the statute.

The marriage of Leonora in 1833, can make no difference, as this disability of coverture cannot be added to that of her infancy, which was in operation at the time of the marriage.

3. One disability cannot be added to another, as coverture to infancy, to save the right of a party against the operation of the statute of limitations of 1809. It is the duty of a party claiming the benefit of the saving in a statute of limitations to show facts giving that protection.

Without, at present, remarking upon the division of the land between Hunter's heirs and the plaintiff, and the effect it might possibly have, we will proceed to enquire whether, considering the land to have continued a joint estate in the heirs of Earle and the heirs of Hunter, the right of action, when the suit was commenced, was saved to the plaintiff in consequence of the infancy of the children of Hunter.

It is admitted that Hunter died more than twenty years before the year 1854, leaving four children, but of what age they were at the time of his death the record does not disclose. One of them married five years before the death of her father, which renders it not improbable that his youngest child may have been of age more than seven years prior to the institution of the suit. But, if this be not so, it was the duty of the plaintiff to show it. And having

failed to do so, he has manifested no right of action when the suit was instituted.

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A portion, at least, of both sets of children were infants when the defendants' possession commenced, and the right of action was, in consequence thereof, saved by the fourth section of the act, for seven years after the youngest child attained full age. The statute did not run in consequence of that infancy until the disability of the youngest child was removed by the attainment of full age. And this disability having been in operation, we have said nothing in regard to the coverture of some of the children, because of the principle that one disability cannot be added to another. As one of the daughters of Hunter, however, seems to have been a *feme covert* at the time of his death, and at the time of the descent cast upon her, and as her right might thereby be saved, we would remark in regard to her coverture that she died in 1841, and in order to save the right of action on the ground of her coverture, the suit should have been instituted within seven years after her death. The casting of descent upon her infant children would make no difference, as their disability could not be added to hers.

It thus appears that, unless disability can be added to disability, no state of case has been shown in regard to the descendants of either Earle or Hunter, which would prevent the bar from operating; and that disability cannot be added to disability, was decided by this court in the case of *South's heirs vs. Thomas' heirs*, 7th Monroe, 60, and the same principle has been repeatedly held since the decision in that case. Infancy cannot be added to infancy, nor coverture to infancy.

This principle was decided to be applicable to the act of 1809, as well as to the general act of limitations in the recent case of *Ashbrook's vs. Quarles' heirs*, M. S. opinion, December term, 1854.

The land embraced by the patent to Hunter and Earle has been divided between the plaintiffs, who

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derives title under Earle and Hunter's heirs, and he has held in severalty since the 24th day of March, 1853. This was only a few months before he commenced his suit, and there is no pretense of a bar by limitation against him after acquiring title in severalty. But after giving him the benefit of any allowable disability of either the heirs of Earle or of Hunter, and the right of action at the institution of the suit was not saved.

4. The statute of 1809, protects the right of all, where part of the persons to whom the title accrues are infants, until all are of full age.

But it is contended, that as the patent to Earle and to Hunter did not issue till the year 1843, their right of action only accrued at that time, and consequently the statute of limitations only commenced running from that period. That is true in regard to the general statute of limitations, limiting the right to recover the possession of lands to twenty years next after the title or cause of action accrued. And the express language of the second section of this general statute is, that any such suit shall be brought upon any title theretofore accrued, or which might thereafter fall or accrue within twenty years next after the title or cause of action accrued, and not afterwards.

5. Seven years possession with title is a protection under the act of 1809, against an equitable, as well as a legal title holder.

The second section of the act of 1809, which is the section applicable to the present controversy, contains language essentially different. Its terms are: "That no action at law, bill in equity, or other process, shall be commenced or sued out by any person or persons claiming under, or by an adverse interfering entry, survey, or patent, whereby to recover the title or possession of land from him or her, who shall hereafter settle on land, to which he or she shall, at the time of such settlement made, have a connected title in law or equity, deducible of record from the commonwealth; and where the settler shall have acquired such claim or title after the time of the settlement made, the limitation shall begin to run only from the time of acquiring such title or claim, but within seven years next after such settlement made," &c. It is readily perceived that this section of the

act of 1809, denies the right of suit altogether where there has been a settlement upon the land which has continued for seven years under a connected title deducible of record from the commonwealth, without regard to the date of the adversary claim or title, and without regard to the time of the accrual of the cause of action, the suit can only be brought within seven years *next after such settlement made, &c.*, or next after the removal of the disabilities mentioned; whereas, by the general statute of limitations, suit is allowed to be brought for the recovery of land, at any time within twenty years *next after the title or cause of action* accrued.

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We think the court did right in rendering judgment for the defendant.

Wherefore, the judgment is affirmed.

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1. Where one of several tenants in common aliens part of the land the purchaser will not be disturbed in his possession, if the other claimants can be satisfied as to their interest out of the remainder.
2. A portion of the grantees of the company to whom the grant was made, called Henderson's grant, (see 3 *Littell's Laws of Kentucky*, 585,) by an ordinance, set apart a portion of the grant for the town of Henderson, by a plan set forth in a plat, in which public grounds, streets, alleys, were laid down: held, that the public grounds, streets, alleys, and the spaces between the lots and the Ohio, were dedicated to public use.
3. It is not competent for the citizens of a town, by deed, to transfer to an individual the title to, or exclusive use of, the streets, alleys, and public grounds dedicated to the use of the public.
4. A citizen of a town, by enclosing and holding adversely for twenty years, may acquire exclusive right to a portion of the public grounds dedicated to public use, but the possession and use must be adverse, and the use exclusive.

The facts of the case are stated in the opinion of the Court. *Rep.*

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J. Harlan, L. W. Powell, and J. W. Crockett, for appellants—

In presenting our view of the law of the case, the counsel admit, that by the ordinance of 1797 there was a valid dedication to public uses, so far as the parties signing the ordinance had title. It is conceived, however, that this dedication was to the local public of Henderson, in which the general public had no vested interest. In the case of *McQuillin's heirs vs. City of Lexington*, 9 Dana, the doctrine is recognized that the commonwealth is, in legal contemplation, sub-divided into subordinate communities, or *quasi* corporations—as counties, cities, and towns—each vested, to a prescribed extent, with sovereign power. For what object was the dedication made? Surely for the comfort, convenience, and enjoyment of all those thus composing, or who should thereafter compose, the local public or sovereignty of the town of Henderson. It never was the intention of the parties making the dedication to vest in the general public an interest in the property, that would enable the general public to thwart, defeat, or obstruct the wishes of the local public. The history of the legislation in this state clearly establishes the fact, that in the opinion of the legislative department of the government, a street or alley might be closed by consent of the town or city composing the local public through which such street or alley passed.

It is considered, upon the authority of the case of *Rowan's executors vs. The Town of Portland*, 8 B. Monroe, that each citizen and lot holder acquired an easement, privilege, or franchise, in the public grounds and streets thus dedicated, but it is insisted that it was an interest of which they might divest themselves by deed. The doctrine is well settled, that this privilege, easement, or franchise, will be lost by twenty years' non-user, especially when during that period individual acts of ownership are shown inconsistent with the rights of those to whom the dedication is made. This doctrine is predicated upon the

presumption of a grant or deed: "The possession of land for the length of time mentioned in the statute of limitations, under a claim of absolute title and ownership, constitutes, against all persons but the sovereign, a conclusive *presumption* of a valid grant." (*Greenleaf on Evidence*, volume 1, page 79, section 16; *Dudley vs. The City of Frankfort*, 12 B. Monroe, 610.)

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If the counsel is correct in supposing that the dedication in this case was to the local public of Henderson, and that that local public could alienate, the question arises how they parted with their title. It is true that all did not sign the deed, but it is likewise true that all sanctioned the agreement. The deed of relinquishment from Alves, Hart, &c., to the lot-holders of Henderson, and the deed of the citizens to Alves, Hart, &c., and the deed of relinquishment from Buck and wife to the lot-holders, all set forth the fact that Water street had been reduced from 200 to 125 feet in width, and that the cross streets run to the waters edge; and the deed from the citizens and lot holders to Alves, Hart, &c., has an amended plat of the town attached, which is recorded as part of it, showing the reduction that was made, &c.

The deed from Buck and wife to the lot-holders recognizes the compromise made with Alves, Hart, and others, and after referring to the original plan of the town, as exhibited in plat A, contains the following clause: "The only exception to the plan or plat aforesaid is that the street nearest the river, commonly called Water street, is agreed upon by all parties shall be reduced to the width of 125 feet, instead of 200 feet, as marked out in said plat." (See page 12, of the additional record.) This deed from Buck and wife was made to all the lot-holders of the town of Henderson; and the recital in the deed, that all parties consented to the reduction of the width of Water street, when taken in connection with the fact that all the deeds made in 1825, touching and concerning the compromise, specially acknowledged

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that the width of Water street had been reduced, and an amended plat of the town was recorded, showing the fact, tends very conclusively to show that all the lot-holders did consent to the reduction of said street.

A period of twenty-five years elapsed from the date of the compromise to the institution of this suit, during all of which time the proof is conclusive that appellants have had possession of at least part of the ground in controversy—indeed they were actually possessed of the strip of land on the river, between 2d and 3d cross streets, above the public square, on which the trespass was committed, for a period of over twenty years before the commencement of this suit. It is insisted that after such a great lapse of time, accompanied by such possession, that a grant from all the citizens must be presumed. (*Greenleaf on Evidence*, vol. 1, section 16; *Craig vs. Austin*, 1 Dana, 517; 6 *Monroe*, 608.)

We invite the attention of the court to the proof in the case, from which we think it clearly appears that James Alves was in the actual possession of the river front, conveyed to him by deed of the citizens in July, 1825, and by the deed of Talbott and Ormsby, commissioners, in 1826, particularly that part of the river front between Water street, as reduced by the compromise, and the river, and between 2d and 3d cross streets, above the public square, and that part of the river front between lots 33, 36, and 37, and the river, since 1828.

On the 20th of February, 1828, James Alves leased to James W. Marshall the ground on the river front embraced in his deeds from Talbott and Ormsby, commissioners, and citizens of Henderson. Marshall kept a wood-yard on that part of it between 2d and 3d cross streets for a year or two, and fenced in a part of it, which fence remained there until about '43. He also occupied the ground between 3d and 4th cross streets as a wood-yard, and enclosed the property in front of lots 33, 36, and 37—which last mentioned

lots were then owned by Marshall, and occupied by him as a residence—which portions of the river front, in front of lots 33, 36, and 37, he held by actual enclosure until he sold his property adjoining, to Anderson, and the possession passed to Anderson, and Anderson has held possession, by actual enclosure, ever since. Anderson having acquired possession from Marshall, Alves' tenant, continued to hold, and now holds, as Alves' tenant. (4 *Bibb*, 34; 4 *Bibb*, 524; 13 *B. Monroe*, 481; 4 *Dana*, 519; see lease from Alves to Marshall, and Bennett G. Marshall's deposition.)

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After Marshall ceased to keep a wood-yard, Alves kept a wood-yard on the river front, between 2d and 3d cross streets, for several years, up to about 1832 inclusive—see depositions of J. S. Hart, Samuel Butler, Lewis Rouse, and David H. Cowan. In September, 1833, Alves leased this property to John Anthony, until 1st January, 1840; Anthony was to build a house on it, and was, by express terms of his lease, to hold possession of all the land claimed and held by Alves on the river front. Anthony built the house between 2d and 3d cross streets, and occupied it for a few months, and then transferred it to William Anthony, who held and occupied it until the expiration of the lease, in 1840, when the possession was surrendered to Alves—see John Anthony's lease from Alves, and deposition of Mrs. Ellen J. Anthony.

In 1840, 41, 42, 43, 44, 45, 46, and 47, Alves rented the house which had been built by Anthony, to various tenants, who occupied it during those years—see deposition of John B. Burke. In 1848 the house fell or was thrown down. In 1840, David R. Burbank leased the ground on the river front, or a part of it between 2nd and 3d cross streets, above the public square, from Alves, and immediately built a warehouse on it, which he has occupied ever since as Alves' tenant—see Burbank's deposition. Clarke & Co., tenants of Alves, were in possession of a part of the property between 2d and 3d cross streets, (the

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part on which the waste was being committed,) and had a coal-house on it when this suit was brought—see deposition of David Clark. It is proved by Geo. Atkinson, (see his deposition,) that he never knew the ground between Water street, (as reduced,) and the river, used as a public highway; and that James Alves had exercised acts of ownership over it for upwards of twenty-five years. He also states that the ditch cut along Water street was cut before 1825, and that he has kept it open ever since; that ditch is on or about the line of Water street, as reduced by the compromise, and between Water street and Burbank's warehouse, Clarke & Co.'s factory, and the house built by John Anthony—which tenements are designated on the plat made part of H. J. Eastin's depositions by marks B or 3, 4, and 5. Young E. Allison, (see his deposition,) states that Alves claimed and occupied the river front.

From the evidence recited, it will be seen that the wood yard kept for a year or two by the tenant, Marshall, under lease of 1828, and the wood yard kept by Alves and Hart for two or three years, the house built by John Anthony under lease of 1833, and afterwards occupied by Wm. Anthony, to whom the lease was transferred, until the lease was fully ended in 1840, was on the ground between 2d and 3d cross streets, above the public square and Water street, as reduced by the compromise, and the river. That immediately on the expiration of Anthony's lease, Alves was restored to the possession of the house, and rented it for seven consecutive years, until the house fell down in 1848. In 1840 Alves leased a portion of this river front between 2d and 3d cross streets, which had been covered by Marshall and Anthony's leases, and occupied by Alves and Hart as a wood yard, to D. R. Burbank, who immediately built a warehouse on it, and has occupied it ever since. In 1850, the time of the commencement of this suit, Alves, by his tenants, Clarke & Co., was in the possession of the part of the ground on which

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the waste was committed. It is proven, beyond a doubt, that the ground between 2d and 3d cross streets has been in the actual, continued, and uninterrupted possession of Alves from 1828 until the commencement of this suit, a period of more than twenty years; every house and tenement on it was built and occupied by Alves' tenants, a less continued and unbroken occupancy than the one proven we conceive would bar an ejectment. It has been held by this court that "any act of the landlord, after his tenant has left the premises, indicating an intention not to abandon but to hold possession, ought to go to the jury, and would justify them in finding a continued possession." (*Brumfield vs. Reynolds*, 4 Bibb, 388.) This is, we believe, in accordance with the current of decisions in all the other states. In South Carolina it has been held, "when the tenement is left vacant for a short period, upon the quitting of a tenant the possession of a landlord will be deemed to have been uninterrupted, if he takes possession in a reasonable time." (*Wilson vs. McLaughlin*, *McMul. Ch.*, 37.)

Every act of Alves in regard to the possession of this property, indicated his intention to hold the possession of the entire river front to the extent covered by his deeds, and no act of his indicated an intention to abandon the possession. "It is well settled in Kentucky, and in the Supreme Court of the United States, that a possession which will bar an ejectment is also a bar in equity." (*Hunt vs. Wickliffe*, 2 Peters, 201; 6 *J. J. Marshall*, 215; 3 *Littell*, 382; 4 *Mon.*, 355; 3 *J. J. Mar.*, 15; 5 *Monroe*, 93; 3 *Monroe*, 40.

Alves entered on the possession of this land, under deeds from the citizen of Henderson, and from the commissioners, Talbott and Ormsby, which deeds marked his boundary; and when he so entered he was possessed to the extent of his boundary, and held adversely to the grantors and all the world. "A person entering on land, claiming by marked boun-

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daries, is in possession to the extent thereof, although the person making the deed had not a title." (*Thomas vs. Honore*, 4 *Bibb*, 563; *Henry vs. Clark*, 4 *Bibb*, 426; 1 *Marshall*, 375, 453; *Jones vs. Child*, 2 *Dana*, 29.) "An owner of land placing a tenant on it, in order to hold possession, not limiting the possession to any specific boundary, thereby acquires a possession co-extensive with his claim." (*Jones vs. Child*, 2 *Dana*, 28; 2 *Marshall*, 515.) It being evident that it was the intention and object of Alves to take and hold possession of the entire river front, when he leased to Marshall in 1828, and having had actual and unbroken possession by his tenants, Marshall and Anderson, who entered and held under said lease, we conceive that he has been in possession of the entire river front, to the extent of the boundary of his deeds, from the date of the lease to the commencement of this suit.

The appellees prove that the factory of Clarke & Co., below the landing, and below Mill or 2d cross street, above the public square, has been in the possession of the tenants of the trustees of the town of Henderson from the date of the compromise, in 1825, to the commencement of this suit. That fact we do not question. Alves never claimed to have possession of the ground on which the factory of Clarke & Co., below the landing and 2d cross street, is located. That piece of ground had been leased by the trustees of the town to Thomas Piers, &c., for ninety-nine years, before the compromise was made, which lease is expressly recognized in the deed from the citizens to Alves and others. Some of the witnesses speak of Audubon and Berthoud as having had possession as the tenants of the trustees of the town, of the property now occupied by Clarke & Co., as a factory, below 2d cross street. Audubon and Berthoud were members of the firm of Thomas Piers, &c., and built a mill on the ground below 2d cross street, leased to them by the town, which is now occupied by Clarke & Co., as a tobacco factory.

The factory of Clarke & Co., above 2d cross street, was built by those claiming under Alves, and has been and is now held and occupied by them.

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James Rouse, in his deposition, speaks of the citizens of the town getting sand from the river bank, and of the trustees collecting warfage along the entire front of the town; the fact that the trustees collected warfage, or that the citizens got sand from under the bank of the river, did not interfere with or divest Alves of his possession to the land on the bank of the river. All the cross streets, each one hundred feet wide, run to the waters edge, and were not conveyed to Alves by the citizens. In their deed to him and others the cross streets are expressly reserved as highways to the water edge, and also in the act of 1827, ratifying the compromise and reducing the limits of the town; and it is at the foot of the cross streets the public wharfs are made. The town collecting wharfage along the entire front, could not divest Alves of his possession to the property on the bank and lying between the cross streets.

The mill spoken of by the witness, Rouse, now owned by James L. Hicks, and referred to, (as No. 9, J. L. Hicks' mill,) on the plat made part of H. J. Eastin's depositions, will be seen by reference to the plat, and by reference to Rouse's deposition, is in 7th cross street, and consequently is not on the land claimed by Alves—all the cross streets, as before stated, extending to the waters edge.

The statement of Rouse about Anthony's declarations when he built the house, can amount to nothing. Anthony took the lease from Alves, and built the house as he had covenanted to do; he transferred it to his brother, Wm. Anthony, who held it under Alves until the expiration of the lease, when he restored the possession to Alves. The witness, Rouse, says Alves claimed the river front, and he acknowledged his title by proposing to buy or lease portions of it from him. We cannot see how the facts stated in his two depositions can be reconciled;

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there is nothing, however, proven by him that shows that Alves was ever for a moment divested of his possession, or that the trustees ever exercised acts of ownership over this property, or held possession of it.

The legislative enactment referred to, sanctions, ratifies and confirms the compromise, agreement, and arrangement under which appellants acquired possession, and it must be presumed that all parties interested petitioned for the passage of this act.

¶ Laws are of two kinds, public and private, and are presumed to be constitutional until the contrary is shown. (See *Cheaney vs. Dunnavan*, 9 B. Monroe.) The laws ratifying the compromise referred to are constitutional it is conceived, if the citizens then composing the local public of the town of Henderson unanimously consented to their passage, and it devolves upon those calling in question their validity, to show that vested rights were interfered with against or without the consent of those whose rights are supposed to be invaded. It is conclusively proven that all the citizens acquiesced in the compromise when it was made, and were pleased and delighted that they had, by that means, quieted the title to their property. See deposition of Wm. F. Smith, George Atkinson, Young E. Allison, and Samuel Stites. There is no proof that any citizen or lot-holder of the town was dissatisfied with the compromise at the time it was made.

In consideration of the compromise the appellants, and those under whom they claim, were induced to surrender a claim to a large interest in the entire town of Henderson, not then barred by the statute of limitations.

The ordinance establishing said town did not divest the original proprietors of their title; the agent, Gen. Hopkins, was vested with no legal title, but with an agency authorizing him to sell; his acts were only binding and valid on such of the proprietors as signed the ordinance establishing the town. There

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was no law authorizing trustees to be appointed in said town until 1812, and that law, nor any law since passed, has vested the trustees of the town with the title to the streets or public grounds of the town.

At the time the compromise was made, only a small portion of the lots embraced in the town of Henderson were in the actual possession of any person. Every lot-holder's property was in jeopardy from Alves' claim; he was in the act of asserting it by suit, and would have done so but for the compromise. The peace, growth, and prosperity of the town, and the interest of all its inhabitants, required that this claim should be satisfied or extinguished. After a lapse of twenty-five years, during all which time the citizens have enjoyed the fruits of the compromise, and a complete legal bar intervenes, which prevents the successful assertion of Alves' claim, the complainants in the cross-bill come into a court of equity, and ask to be permitted to repudiate the compromise. They, with hands stained with bad faith, invoke the aid of a court which "nothing can call forth into activity but conscience, good faith, and reasonable diligence." It is entirely out of the power of the court to place the parties in *statu quo*, and it is most earnestly insisted that no court of equity should sanction the conduct of appellees. The compromise is acquiesced in and regarded as binding and valid until whatever rights appellants had are lost by lapse of time, and then they contend that the compromise is wholly nugatory. "He who seeks equity must do equity." In relation to the same subject, the court is referred to the following cases, in which the principle that he who seeks equity must do equity has been applied in practice: (*Nelson's heirs vs. Clay*, 5 *Littell*, 150; *Stevenson and wife vs. Dunlap's heirs*, 7 *Mon.*, 146; *Ringo, &c. vs. Warder, &c., & B. Monroe*, 516; *Howard and wife vs. Current, &c., & B. Monroe*, 494.)

Reference is made to the answer of James Alves to show the exact interest owned by him, and to the deposition of Wm. J. Alves and Richard Sneed, by

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which it is proven that those under whom James Alves holds were the heirs and representatives of the original grantees. Notwithstanding James Alves, after 1826, acquired large interest by purchase in the town, he made no effort to disturb the compromise; he brought no suit; he claimed the property of no citizen, but adhered in good faith to the compromise. We believe that the law, equity, morality, and common honesty, would alike compel the appellees to adhere to a compromise made in good faith, and acquiesced in by the parties, until the appellants have been by time deprived of valuable vested rights. "The law looks upon compromises with the utmost indulgence." (*Mitchell's heirs vs. Long*, 5 *Littell*, 72; 5 *Monroe*, 424; 6 *Monroe*, 100.)

Upon the authority of the case of the *Bank of the United States vs. the city of Louisville*, and *Rowan vs. same*, 3 *B. Monroe*, 144, it is contended, that after the long acquiescence of the appellees in the compromise, sanctioned by recognitions annually repeated by the trustees of the town, for twenty-five years, they should be estopped. In the case above cited, the court says: "Such long acquiescence and multiplied recognitions not only conduce persuasively to establish the validity of the original sale, but should now operate as an estoppel." It has been held in New York, that "when a person stood by and saw a great and costly improvement made upon land by persons claiming title, and believing themselves owners in fee, and interposed no pretension of title for thirteen years, it was held that he was thereby estopped from making any claim to the land." (*Higginbottom vs. Burnett*, 5 *Johnson, C. R.* 184; *Wendell vs. Van Ranslear*, 1 *Johnson, C. R.*, 354.) In this case the appellees stood by for twenty-five years, and saw valuable improvements put upon the land, and made no pretensions of title.

Lapse of time presents an impregnable barrier to relief on the cross-bill. The compromise was made twenty-five years before the commencement of this

suit; it has been recognized and acquiesced in by the parties ever since; year after year the property has been assessed for taxation, and Alves has paid tax on the assessments. The trustees and inhabitants have permitted Alves to sell, lease, and improve parts of the land in contest, without hindrance or molestation. They have stood by and seen him expend his money, labor, care, and energy upon this property, in faith of the compromise under which he claims title. To disturb the compromise at this late period, would be a fraud upon appellants. As sustaining this view of the case the court is referred to the following authorities: (*Smith vs. Clay*, 3 *Brown's Chancery Reports*; *Henry vs. Dinwoody*, 4 *Brown's Chancery Reports*; *Beckford vs. Wade*, 17 *Vesey R.* 87; *Prevost vs. Geoty*, 6 *Wheat.*, 481; *Hughes vs. Edwards*, 9 *Wheat.*, 489; *Millers' heirs vs. McIntyre*, 6 *Peters*, 61; *Piatt vs. Vatteir*, 9 *Peters*, 405; *Barnett vs. Emmerson*, 6 *Mon.*, 608; *McConnell vs. Bowdley's heirs*, 4 *Monroe*, 394; *Patrick's heirs vs. Chenault*, 6 *Mon.*, 318; and especially to *Bowman, et al. vs. Wother, et al.*, 1 *Howard Reports*, 189; *Tavis vs. Eliza*, 7 *Dana*, 399.

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From the foregoing statement, arguments, and authorities, we conceive the following facts and legal propositions are established :

1st. The town of Henderson having been established by private individuals, without legislative enactment, and laid off into streets, public squares, &c., the dedication to public uses was only binding upon such of the proprietors as signed the ordinance ratifying and adopting the plan of the town, as laid out by Allen. And such dedication could not prevent the proprietors of Richard Henderson & Co.'s grant, who had not joined in the ordinance and dedication, from asserting title, and recovering their interest in the town.

2d. That Alves, and those under whom he claimed, had a vested interest in the town, from the recovery of which they were not prevented by said supposed dedication—William Johnson and others, un-

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der whom he claimed, never having signed the ordinance establishing the town.

3d. The compromise having been made in good faith, and Alves and others having transferred to all the citizens and lot-holders their interest in the town, in consideration for the property in litigation, &c., which was conveyed to Alves and others by a large number of the citizens, which conveyance, together with an amended plat of the town, (showing the reduction made by the compromise in Water street and the public square,) was recorded in 1825. Alves immediately took possession of the property in litigation, and has held it ever since, claiming it as his own—the trustees and citizens recognizing his title until the commencement of this suit. After such long acquiescence, accompanied by possession, a deed from all the citizens will be presumed.

4th. The Legislature of Kentucky having, in 1827, passed an act ratifying and confirming the compromise, an arrangement made in 1825 between the citizens and lot-holders of the town, and Alves, Hart, and others, and reducing the limits of the town in accordance with the terms of the compromise. The citizens and trustees of the town having acquiesced in said act for twenty-three years before the commencement of this suit, the consent of all the citizens and lot-holders of said town, to the passage of said act, must be presumed.

5th. It not appearing from the record that any citizens objected to the compromise, or to the passage of the act of the Legislature, confirming and ratifying the same, after this long lapse of time, the consent of all the citizens to the compromise, and to the passage of the act of 1827, will be presumed; and the compromise held binding against the trustees and all the citizens and lot-holders, and the legislative enactments will be held valid and constitutional.

6th. The citizens and trustees of the town having acquiesced in the compromise for twenty-five years,

and the town having recognized the title of Alves by having the property annually assessed for taxation, the trustees altering the assessment, and having the taxes on the assessments collected, they are estopped to deny his title.

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7th. The citizens and lot-holders having received Alves' title to a valuable vested interest in the town, and acquiesced in the compromise until time would bar Alves' recovery, the chancellor being unable to place the parties in *statu quo*, cannot afford any relief to the appellees on their cross-bill: "He who seeks equity must do equity!"

8th. The trustees and the citizens of Henderson having stood by twenty-five years, and permitted Alves to exercise acts of ownership over the property, claiming it as his own, selling parts of it, and putting valuable improvements on other parts of it, without setting up any claim, or pretending to have any right or title to the same, are estopped from asserting title, and to permit them to do so at this late day would be a fraud upon the rights of Alves.

9th. Alves having been in the actual possession of the property for more than twenty years before the commencement of this suit, the appellees' right of entry, if any they had, is tolled, and Alves, by virtue of such possession, is vested with a perfect fee simple title to the land in controversy.

Lastly, it is contended that this cause must be reversed, because the entire property is decreed appellees, when it is clear, from the proof, that part, at least, had been in the actual possession of Alves twenty years next before the institution of this suit; and to that extent, at least, bringing the case within the principles recognized by this court in the case of *Dudley vs. The City of Frankfort*.

We conceive, from all the facts in the case, that the relief asked by appellants should have been granted, and that the trustees should have been perpetually enjoined, &c. The principles settled in the case of *Dudley vs. The City of Frankfort*, and the au-

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thorities there cited, we deem sufficient to show that it is the province of the chancellor to protect the citizens from trespass and waste, such as complained of in appellant's bill.

Many of the questions in this case are interesting ; the counsel have not considered it necessary to enter into an elaborate argument of the case, and have merely endeavored, by the foregoing suggestions, to direct the court to those points which they consider must control it.

Menzies & Spilman for appellees—

We shall, in support of the correctness of the decree, lay down and endeavor to establish the following propositions :

1. That the dedication of the public grounds in the town of Henderson, as commons for public use, was as perfect, complete, and effectual, against all the original proprietors of the land, and those claiming under them, as if the town had been, upon their application, established by an act of the Legislature, and that, too, whether they signed the ordinance establishing the town or not.

2. That inasmuch as the town was established, not by an act of the Legislature, but by a private ordinance merely, the legal title to the public grounds never vested in the town, or its citizens or trustees, but remained in the original proprietors and their heirs, who held the same in trust for the use of the public as a common.

3. That the deed from sundry citizens and lot-holders to Alves' heirs and others, for the ground in contest, was wholly inoperative and void, and conveyed no title whatever.

4. That the act of the Legislature, undertaking to ratify and legalize this arrangement, was entirely ineffectual for that purpose.

5. That as the trustees of the town of Henderson were not the repositories of the legal title to the public grounds, and therefore not entrusted by law with

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its defense and preservation, no act or omission on their part, with reference to the claim of Alves, could operate as an estoppel against the claim of the public to this right of common.

6. That so far from the city being estopped to deny the claim of Alves, the appellants are, in fact, estopped to assert any claim inconsistent with the public right of common.

7. That even if Alves were not estopped to assert any claim as against the public, still his possession adversely to the city has not been of such character and duration as to have ripened into a title.

We shall now offer a few suggestions and authorities in support of these propositions.

1. First, then, as to the dedication. The pleadings in the Circuit Court lay stress upon the alleged fact, that only a portion of the original proprietors of the land *signed the ordinance* establishing the town, from which the conclusion, not very logical, is drawn, that the dedication is not binding upon them or their heirs. Our first answer to this is, that there is no evidence in the record that the ordinance was not signed by all who had an interest, *at the time*, in the lands upon which the town was located. The language of the ordinance imports the consent of the entire "Transylvania Company," and there is no *proof* in the record, unless it has escaped our notice, showing that any others had, *at that date*, any interest in the land. Secondly, this ordinance *was signed by Walter Alves*, the ancestor of James Alves, the original complainant in the court below, and whose rights alone the appellants in this court represent, which takes this objection out of the mouths of the appellants. Thirdly, even if the ordinance had not been signed at all, it would not have affected the validity of the dedication, as a dedication may be made by parol as well as in writing, and will be presumed whenever lots are laid off and sold upon, and calling for, public grounds. (*City of Cincinnati vs. White's lessee*, 6 Peters, 431; *Barclay, &c. vs. Howell's lessee*,

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6 *Peters*, 728; *Trustees of Augusta vs. Perkins*, 3 *B. Monroe*, 437; *Rowan's ex'ors vs. Town of Portland*, 8 *B. Monroe*, 232 and 237; *Trustees of Dover vs. Fox*, 9 *B. Monroe*, 201; *Wickliffe vs. City of Lexington*, 11 *B. Monroe*, 163.) Moreover, from the establishment of the town, in 1797, to about about 1825, a period of about twenty-eight years, these public grounds were used as such without objection or private claim.— But a dedication of a street will be presumed from four or five years use. (*Jarvis vs. Dean*, 3 *Bingham*, 447.) It is therefore entirely immaterial whether the ordinance was or was not signed by all or any of the proprietors, so far as the dedication is concerned.

2. Our second proposition, viz: that the legal title to the public grounds never vested in the trustees of the town of Henderson, but remained in the original proprietors and their heirs, will not, we presume, be controverted. We shall at least assume it to be true. It is so admitted by Alves in the record.

3. We come now to the question of the validity of the deed from sundry "citizens and lot-holders," by which it is claimed that this ground was conveyed. We maintain that this deed was utterly void: *First*. Because the interest of said lot-holders and citizens in said public grounds, was only the right to their use as a common, and the deed being only a quit claim of "their right, title, and interest," without warranty, could not, and did not, attempt to convey anything more than this public and common right; and as the vendees already possessed this right as fully as it could be vested in them, as a portion of the public, and the deed contained no warranty, it was wholly inoperative, and nothing passed by it. *Secondly*. Because the right which they undertook to convey was a public right, over which they, as *individuals*, had no control, and which they had no power to alien or transfer, to the prejudice of the public. *Thirdly*. Because, even if the interest attempted to be transferred had been a vendible one, as the whole

community was interested in it, all must have joined in its transfer; but the deed is executed by only thirty-one persons, when it is proven that the population of the town alone, (to say nothing of the surrounding country whose interests were affected,) was five hundred, many of whom were lot-holders. See record, pages 87, 88. *Fourthly.* Because the right of common, having once vested by virtue of a dedication, is not confined to any given number or class of citizens, but extends to the entire public, whenever, as in this case, the common is of such a character as to be useful to the public generally, so that even if the right were in its nature vendible, no given number of citizens could alien it to the prejudice of others.

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But we are met, by the counsel for the appellants, with the position that long acquiescence in this deed, on the part of the citizens generally, would not only render it valid as against those who united in it, but would raise a presumption that a conveyance had been made by *all the citizens*. We must be excused for saying that the sophistry of this proposition is transparent. What is this acquiescence relied on, and how is it evidenced? It will not be pretended that there has been any overt or affirmative action on the part of the citizens generally, sanctioning or assenting to this deed. How, then, have they manifested their acquiescence? By doing nothing? But inaction is not always evidence of acquiescence.—Acquiescence can be predicated of *inaction* only where a party fails to act when he is under obligations to do something, or is silent *when he ought to speak*.

Now, what have the citizens omitted which they ought to have done? Here was a deed made by a portion of the citizens. It was utterly void and inoperative. In a legal sense it was a perfect nullity. Who, therefore, was called upon to pay any attention to it? Shall a town meeting be called, and solemn resolutions passed, to disavow and avoid the ef-

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fect of that which, in law, is absolutely *without effect*? As well might the executive be required to order out the militia of the State to subdue an effigy, or expel an *ignis fatuus* from the swamp. Inaction, an entire disregard of this deed, by *treating it as a nullity*, is precisely what was and ought to have been done. And the proof is clear, that the citizens generally were in the habit of treating and using this ground as a public street or common. Deposition of J. W. Clay, p. 107, of record.

But, suppose it were admitted that the citizens generally had sanctioned and acquiesced in this deed.— We have already shown that this deed only purported to convey, and did convey, (if anything,) only the right of common in this ground. An acquiescence in the deed, therefore, would only be sanctioning the right and claim of the appellants to the use of this ground as a public common, which claim we cheerfully concede. Such acquiescence, certainly, could not change or enlarge the legal import of the deed. In every aspect of the case, therefore, the deed amounts to nothing.

4. We come now to consider the effect of the act of assembly, which undertakes to “ratify” and “legalize” this arrangement. It is unnecessary to state that this act was probably procured without the sanction, or even the knowledge, of a tithe of the community interested in the subject of it. But even if otherwise, the act, as to this transaction, is perfectly nugatory and inoperative. *First.* Because said act could not *vitalize* a deed which was entirely devoid of legal force or obligation; nor, so retro-act upon a past contract, as, by virtue thereof, to create a non-existent right, which the terms of the contract did not legally import; and, therefore, said act did not vest the grantees of said deed with any right not before possessed by them, nor divest the grantors, much less the citizens generally, of any right which they possessed. *Secondly.* Because, if such had been the operation of the act, it would have been uncon-

stitutional, being an interference with vested rights. In confirmation of the first position, we have only to add that, as already shown in the discussion of the preceding general proposition, this contract only purported to convey the right of common, and it is to be presumed that the Legislature only intended to carry out the contract according to its literal and obvious import, which was to transfer the right of common, and this is all that they attempted, or had a right to do. (*Transylvania University vs. City of Lexington*, 3 B. Monroe, 28.)

But if they intended, or the act purported to go further, and deprive a whole community of the right of common in this river front, the Legislature undertook to do what it had not the constitutional power to do.

The case of the *Transylvania University vs. The City of Lexington*, above cited, which in some respects bears a strong analogy to this, is essentially different in one respect. The question there was as to the temporary occlusion of a part of Third street, which separated different portions of grounds, the whole of which belonged to the University, and were *surrounded by open streets*. In pursuance of a contract made between the trustees of the town and Transylvania University, the Legislature passed an act closing the street. It was a question of doubt, in that case, whether *private rights* had, *in fact*, been affected by the occlusion of this street, from the fact, that in the very nature of the case, it might concern only the University itself, as the University was the exclusive owner of all the lands on each side of the inclosed portion of Third street, and the whole was *surrounded by open streets*. The court, however, after intimating a doubt with respect to the interest of other parties in this street, declines to decide the question, because it is not judicially presented, but adds this significant remark: "And private rights being untouched we have no doubt that the Legislature has power to regulate and alter all the public highways

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in the Commonwealth, in towns and cities as well as in the country." There is certainly here an unmistakable intimation, that in such legislative interference "*private rights*" must be "*untouched*." In the case at bar there can be no question as to the *interest* of every citizen in the public use of the property in contest. Streets are easily laid off and made, at any point, and may be exchanged, substituted, and multiplied to any desired extent. And, as in the Transylvania case, they may be so located as to be of but little if any utility to any, except those whose property lies immediately upon them. But a river shore is, in its very nature, limited in its extent, and peculiar in its uses. Here and there a majestic stream stretches across our fertile plains, its bosom the great highway of travel and commerce, and its shores the common receptacle for shipment and delivery of the products of the country. What God has given us, of these beautiful margins, that we may use and enjoy; but the combined power of all the legislative and judicial tribunals of the world *cannot make a river shore*. There is no citizen, therefore, in town or country, who is not interested in the preservation of this shore as a common, and who did not, by virtue of its dedication, acquire a private right therein; of which he cannot constitutionally be divested, without his consent affirmatively given.

We rely, therefore, upon the Transylvania case, above cited, in support of the position that this act, if it purported to divest this right, was so far unconstitutional and void.

But we are again met with the doctrine of acquiescence in this legislative act, as the foundation of a presumption of general consent to the surrender by the community, of the right of common. We answer, as in case of the deed, that if the act was void, or its only effect was to sanction a deed which conveyed nothing prejudicial to the public, no protest or dissent was necessary, and therefore silence was no

evidence of acquiescence, and acquiescence in fact could work no detriment to the public.

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5. Our next proposition is, that as the trustees of the town of Henderson were not the repositories of the legal title to the public grounds, no act or omission on their part with regard to the claim of Alves, could estop or prejudice the claim of the public.

We have already stated that the town was not established by the legislature, nor the legal title to the public grounds vested in trustees. If such had been the case, it might have been said, at least with plausibility, that the citizens, by electing trustees, voluntarily put the guardianship of this title, to some extent, in their hands. But they were not elected for this purpose, or with this power. As to this matter, they acted only as private individuals.

Any proceedings of theirs, therefore, with regard to the assessment of this property in the name of Alves, would not bind or prejudice the public, since they, by virtue of their office, were neither the custodians nor the guardians of the title to these public grounds. In assuming this position, it is by no means admitting that these *acts*, on their part, are such as would, in any view of the case, operate as an estoppel. We hold the contrary. Even unexplained, they would be insufficient; but it is shown that at the same time that the trustees were acting upon these assessments, they were declaring that the ground in contest belonged to the town as a common. They seem not to have considered very maturely the character or bearing of their acts in regard to these assessments, or, which is more probable, they thought that was a matter which Alves was bound to take care of, and not they.

The case of the *City of Louisville vs. the Bank of the United States*, 3 B. Monroe, 136, where the city was held to be estopped, by the acts of the trustees, to assert title to certain grounds which had once been a common, was very different from this case: first, in the fact that Louisville was established by an act of

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the Legislature, and the legal title to her public grounds was in the trustees, and the court treated them as its guardians; and secondly, in the character and solemnity of the acts by which they were adjudged to be estopped, being nothing less than the giving, receiving, and placing on record, several deeds of conveyance, recognizing facts, which, in that suit, were controverted by them.

But, on the subject of estoppel, there is a question far behind this, and which will render the further consideration of this entirely unnecessary. It arises upon our sixth general proposition, which is:

6. That so far from the city being estopped to deny the claim of Alves, the appellants, as the representatives of Alves, are estopped to assert any private claim, inconsistent with the right of common in this ground in contest.

That this ground was originally dedicated as a street, is not, and cannot be denied. And even if it had not been expressly dedicated, being a river shore, and the town located on the river, it would have been presumed, or impliedly dedicated, as abundantly shown by the authorities cited above, under the head of dedication. It further appears, that the legal title to these grounds never passed out of the proprietors, but still rests in their heirs, and that Jas. Alves, the original complainant, was a son of Walter Alves, one of the original proprietors who signed the ordinance establishing the town.

In what position then, does the law place him and the appellants as his representatives? The authorities are clear and unequivocal, that they are trustees, standing in precisely the same position towards the public as trustees of towns, in whom the legal title is vested, to public grounds. (*Wickliffe vs. City of Lexington*, 11 B. Monroe, 164.) And they are *estopped to set up private claim to it, or revoke the dedication*. (*City of Cincinnati vs. White's lessee*, 6 Peters, 439.) Verily, this doctrine of estoppel, on which the appellants

are fain to rely, makes sad havoc, when turned against their own batteries.

7. Our last proposition is, that even if Alves had not been estopped to set up claim, by his relation to the public as trustee, still, his possession of this ground in contest, has not been of such character and duration as to have ripened into a title.

Under this head, we may with propriety lay down this, as a fundamental proposition, that, except so far as this ground was actually inclosed, or occupied by some kind of building or improvement, it was not in the adverse possession of Alves. For, his occasionally going upon it, did not in the least militate against the right and privilege of others, to use it in like manner. To contend that this sort of occasional use, may be construed as a possession adverse to that of the public, so as to mature it into an individual title, would involve the legal fallacy, after twenty years use of public ground, of vesting *each individual*, who had so used it habitually, with an exclusive individual title by lapse of time, provided that in the mean time he has laid claim to the land. A proposition so absurd, carries its refutation upon its very face, and should be stamped with the seal of judicial condemnation. No one will contend for the proposition in this naked form; but it is the legitimate result of a claim of title by lapse of time, based upon this occasional use, which does not exclude the public from a participation in the use.

The only actual occupancy of any part of this ground, at a period sufficiently remote to be available, was by the woodyard of Alves and Marshall; and of this it may be said, first, that it was a legitimate use of this common, and therefore not hostile to the public right; and, secondly, it was discontinued; and, therefore, even if hostile, it was not an uninterrupted adverse possession. So that, even if Alves had not been estopped, by his position as trustee for the public, to take, or rely on an adverse possession against the city, his evidence of possession is entirely inad-

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quate to sustain his claim, and we respectfully ask that the decree of the Circuit Court may be affirmed.

Hughes and Dallam, on the same side—

The argument of the associate counsel, has so ably and fully presented the questions of law arising upon this record, that little remains to be said.

There is one question, however, raised by Alves' answer to the cross-bill of the trustees, upon which we will offer a few suggestive remarks:

Alves in his answer contends, that as lapse of time has barred him from asserting his rights at law, and the chancellor cannot therefore put him in "*statu quo*," it is and will be a fraud on him to "*rip up*" this transaction.

To this we answer—first, that *he* has voluntarily sought the aid of the chancellor. Second, that a thorough examination and appreciation of the evidence will surely determine the mind of the chancellor, that the trustees and not himself are to be encouraged with the smiles and favor of the equitable tribunal herein.

The ordinance of 1797 was signed, as he himself has admitted and proved, by James Hogg, his grandfather, by Walter Alves, his father, who was then the husband of Amelia Alves, his mother, who was the "*only heir*" of Wm. Johnston. At the time of the "*compromise*," in 1825, he had no claim, as he admits, but that which he derived from these sources.

He and his father Walter Alves, both resided in the town of Henderson, or its vicinity, and a large tract of land, four hundred and fifty acres, adjoining the town, was in their possession—how much more of the grant does not appear, but it is fair to presume they participated largely in the increased value of all the lands lying contiguous to the town, embracing far and near their interest in two hundred thousand acres, and had received their portion of the money arising from the sale of the lots. While thus

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in enjoyment of the land, in business in the town which had been laid off by one of them at least—Walter Alves—with the express view and expectation “of greatly enhancing the value of all the land in the grant”—see ordinance, page 17—“one Charles Buck, claiming to be the representative of Luttrell,” in 1817 or 1818, twenty years after the town had been laid off and established, many years after the lots had been sold, set up claim to the lands in the grant. (He Buck, if he *was* the representative of Luttrell, had some shadow of right, for the ordinance, from the proof, appears to have been signed by Umstead, who was only the husband of the widow of Luttrell.) Litigation commences between Buck and those holding under the grant; it continues until 1825. Alves waits patiently and anxiously to see if Buck “can succeed,” and never breathes a syllable in all this time of any right he has. The people become wearied with litigation with Buck; they are anxious to “quiet matters;” they concoct a scheme to buy him off; they become ripe to do so. “Just at this point” Alves’ claim is heard of for the first time; it is mentioned to the man Morris, who has undertaken to settle Buck’s claim. It is urged upon the people as a claim similar to Buck’s. They do not discriminate; have not the means or information to do so; are heartily tired of the harrassments of law—harrassments, if the appellant’s views prevailed, growing out of the unauthorized acts of Walter Alves’, the ancestor of appellants, and under whom they claim—and the consequence is, they, the citizens, are hurried into a payment of money to Buck, and a conveyance to Alves, (as *that* comes easy,) of the public grounds dedicated to the town. An act of the Legislature is procured, by means easy to guess from what preceded; the people of the town, and their trustees, are persuaded they have made a capital arrangement; have “bought their peace” easy. Insidious and cautious steps are taken to perfect the title thus acquired, by “ACTS OF OWNERSHIP,”

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listing for taxation, &c. A lease is given to every squatter or keeper of a lumber or woodyard, that is permitted or suffered by the town to get there. Meanwhile the four hundred and fifty acres of land greatly increase in value by reason of the town, in-somuch that a large portion of it can be sold by the foot as "town lots." The territory becomes valuable, *only* because the town needs it for the enlargement of its public landings, as the town increases. Whereupon, immediately *private rights are "seriously"* urged, and this deed of "*compromise*," and its attendant circumstances of "good faith," legislative acts, and "acquiescence," are dwelt upon with great unction, to show that the resistance of Alves' claim to shut the town out from the river, is iniquitous and "a fraud." The conclusion, from this short summary of proven facts, is obvious.

We do not admit, however, that the ordinance was invalid in any respect. "Richard Henderson & Co.," to whom the land was granted, was a *firm of co-partners*; the land was a joint stock concern; whether the interest therein of a deceased co-partner descended to his heirs, or went to his personal representative, is a vexed question truly, but not necessary to settle in this case. The lapse of time, the recording of the ordinance, plat, and survey, in the proper office, the deed of partition, and all the attendant circumstances, authorize the court and the law to *presume* any grant, conveyance, power, articles of co-partnership, or other legal paper necessary and proper to make valid and binding the ordinance, and that, too, before the deed of compromise.

Our attention has just been called to the brief of appellants counsel, wherein a different construction has been given by them to the testimony of Marshall on the question of possession. The deposition of this witness is somewhat obscure, but he speaks of but *one inclosure*, and we are satisfied that a scrutiny of his deposition, compared with the other testi-

mony on this subject, will satisfy the court that *our* statement of his evidence is the *true one*.

The counsel for appellants also remark that the statements in James Rouse's two depositions "cannot be reconciled." This witness was introduced by appellants to prove their possession, and a strict scrutiny and analysis of the two depositions are asked in justice to the witness, for it will, we think, show no discrepancy or contradiction whatever between them.

In conclusion, we will only call the attention of the court to the case of *Buckner vs. the town of Augusta*, in 1 *Marshall*, page 9, as authority on the subject of the trustees' recognition of Alves' claim by taxing and otherwise.

We do not perceive that it is overruled by the case of the *City of Louisville vs. the Bank of the United States*, in 3 *B. Monroe*.

And we will also ask the court's attention to the significant fact, that the act of ratification by the Legislature, relied on by appellants—(session acts of 1827,) ratifies and legalizes the arrangement only, "so far as it effects the interests of the parties to the arrangement or compromise aforesaid."

We pray an affirmance of the decree.

Chief Justice MARSHALL delivered the opinion of the Court.

July 11.

James Alves, claiming to own and to have been for more than twenty years in possession of the land between the Ohio river and Water street. (reduced,) in the town of Henderson, except the cross streets running to the river, filed his bill in 1850, to enjoin Vanzant from continuing to excavate and remove the earth on a portion of that land near the river, which he claimed to be doing under the authority of the trustees, who having been brought before the court by Vanzant, made their answer a cross bill against the complainant, asserted the right of the town in the entire slip between the river and the lots fronting on Water street, under an ordinance of Richard Hen-

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derson and company, establishing the town according to a plat, which showed that said slip was dedicated to the use of the town and the public, and calling upon the complainant to exhibit his title, they pray that the title of the town may be quieted, &c.

Alves, in his answer to the cross-bill, relies upon various deeds purporting to convey to him different interests derived from some of the original members of the company of Richard Henderson and company, to which company the Legislature of Virginia, by an act of 1778, to be found in 3d Littell's Laws of Kentucky, 585, had granted, by the name of Richard Henderson and company and their heirs as tenants in common, and without further designation of the grantees, two hundred thousand acres of land on the Ohio, which included what was originally called "the Red Banks," afterwards known as the town of Henderson, and situated on the Ohio river in the present county of Henderson. And he relies especially upon a deed of 1825, purporting to be made by the citizens and lot-holders of the town of Henderson, and to convey to himself and others, whose interest in the slip of land in contest were afterwards conveyed to him, besides certain portions of the public square, all their right, title, and interest in and to Water street, reduced to one hundred and twenty-five feet, which description seems to have been intended to embrace the entire river front between Water street reduced and the river. This deed was in fact executed by a minority of the holders or owners of lots at its date, and by a part only of the citizens. It purports to be made in consideration of certain rights relinquished by Amelia Alves, the heirs of Walter Alves, (of whom James Alves was one,) and Richard G. Hart, as made by a deed between these parties and the citizens of the town of the same date. Which deed, last referred to, conveys the right, title, and interest of the grantors in certain designated lots and in the streets, except the part between the river and Water street reduced, to the citizens of the

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town, and states its consideration to be the relinquishment by the citizens as evidenced by the deed from them. And the complainant alleges that these deeds were made in compromise of a claim set up by him and others under Richard Henderson & Co.; that the arrangement was made with the consent and approbation of all the citizens, and was moreover ratified by an act of the Legislature in 1827; that all ought to be bound by it, and that should it be disregarded in behalf of the town, great injustice will be done to the adverse claimants, and especially to himself, as their claim is now barred by the statute of limitations, and they cannot be placed in *statu quo*. He shows subsequent conveyances to himself from Amelia Alves and the heirs of Walter Alves and others. He relies also upon his alleged possession ever since 1825, upon leases, transfers, and other acts of dominion on his part, on his continued payment of taxes for it to the town, and on the recognition of his title by the trustees, in fixing the amount of taxes to be charged therefor. James Alves having died, the original and cross-bills were revived by and against his executors and heirs.

Upon the hearing, a decree was rendered dissolving the injunction which Alves had obtained, and forever quieting the trustees of the town of Henderson, so far as the executors and heirs of Alves are concerned, in the possession, use, and enjoyment of the territory between Front or Water street of said town and the Ohio river, to be held by them as a public common, highway, and landing for the use and benefit of the citizens of said town. And the case is brought to this court by the representatives of Alves.

It appears that as early as June, 1797, Gen. Samuel Hopkins, as the agent, and Thomas Allen, as the surveyor, of Richard Henderson & Co., laid off the town of Henderson, and made a plat of it, exhibiting and defining the lots, streets, and alleys, a large open space as a public square, and the space between

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the river and the lots fronting towards it entirely open without mark or division ; which plat, with the ordinance now to be noticed, was recorded in the Henderson county court. In August of the year 1797, James Hogg and John Williams, two of the original members, and others, claiming to represent other members, met at Williamsborough, North Carolina, and passed an ordinance entitled, "ordinance of the Transylvania company, commonly called Richard Henderson and company, directing the disposal of the town of Henderson and the out lots." The first sentence is as follows : "Be it resolved and ordained, that the town of Henderson and all the land, lots, streets, apportionments, and appointments thereof, lying on the Ohio river, in the county of Christian, (as it then was,) and state of Kentucky, as laid off and surveyed by our agent, Samuel Hopkins, and our surveyor, Thomas Allen, agreeable to the plat or form by them made, and to us returned with their certificate, be and the same is hereby established."

The ordinance then goes on to describe more particularly the manner in which the town had been laid off, to give and grant all the lands located in said plats for the purposes of the town, and to prescribe the manner and terms of disposing of lots by the agent, directing donations in some circumstances, also prescribing forfeitures for failure to improve, &c., and reciting the probable advantage to the lands generally from the speedy settlement of the town. It also makes formal provisions with respect to the responsibility of their agent, that he shall submit his books annually to the inspection of commissioners, who have power to remove him for cause ; that he shall sell and convey the lots, collect the proceeds, and pay them over in proper proportions to the several persons entitled, or their private agents, &c., &c. And it continues the agency of Samuel Hopkins, with the powers above stated. The conclusion of the instrument is, "in testimony whereof, we the aforesaid company have hereunto set our hands and

seals this 9th day of August, 1797." Then follow the names and seals of nine persons, the original number of the company, of which names four are identical with the names of original grantees, owning originally four-eighths of the entire grant; and one other is the name of Walter Alves, the father of the complainant James, through whom he derives a considerable part of his interest, from John Williams, James Hogg, and Thomas Hart, whose names, (that of Thomas Hart by attorney,) are all signed to the ordinance. The fourth name identical with that of an original grantee entitled to one-eighth of the grant, is that of Nathaniel Hart. The identity of name in connection with lapse of time, and the notorious acts done under the ordinance, would authorize the assumption that Nathaniel Hart, the party to the ordinance, was the original grantee of the same name. There is no fact or suggestion in the case to the contrary, unless it be the statement of James Alves in his answer, that only three of the original company were alive at the date of the ordinance. And unless the fact known to one member of the court to have been proved in another case, having no connection with this and not referred in it, that Nathaniel Hart died in 1782, is to operate in this case, it must be presumed that Nathaniel Hart, one of the original grantees, was also a party to the ordinance. But be this as it may, the lapse of time and the nature of the acts done under the ordinance, not only justified the assumption, after the lapse of twenty years, and before 1825, that the ordinance and the signatures thereunto were the genuine acts of those who appear parties to it, but then also authorized the presumption that those who adopted and signed it in the name of the company were either themselves the company, or were authorized to act for it. And it would devolve upon those who deny its efficacy as to themselves, to make out in proof the ground of impeachment. It is to be observed that the act of 1778 making the grant, does not name the individual

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grantees, but grants the two hundred thousand acres of land to Richard Henderson & Co., and their heirs as tenants in common, thus apparently making or treating them as a *quasi* corporation, so long at least as the original grantees survived and the land remained in common. What regulations the original grantees constituting Richard Henderson & Co., may have made for determining and evidencing the will of the company with respect to its common interests, and for exercising dominion over the common property, this record does not show. But it is to be presumed that an act so important and so formal as this ordinance, adopted in the name of the company, and signed and sealed in such a manner as to bind the interests of the actual parties to it, and of such others as they had a right to bind, and to which several of the original grantees were parties, was in fact, as it purports to be, the act of the company, and as such binding upon all its members.

As to all persons interested in the grant at the date of the ordinance, and who were then *sui juris*, and who had acquiesced in it, this presumption must have prevailed *prima facie* in 1825, and has now become almost irresistible. And even if a *feme covert* or infant were then entitled as heirs of an original grantee, we are not satisfied that such an interest left by the ancestor, involved with the larger interests of a company of which he was member, and to whose acts his own interests were subject, should not also be bound by the acts of the company done in proper form for the common advantage, and of which the *infant or feme covert* may have, in common with others, the full benefit.

Independently of the mere value of the land on which a town is established, its settlement and growth necessarily enhance the value of the adjacent lands, and those who receive the benefit of this exhancement, to the full value of their interests in the land covered by the town, established by their co-tenants on a minute portion of the common land,

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have little right in conscience, (though they may not have been divested of their title,) if they repudiate the authority by which the town was established, to claim at the same time the land within it, or its value enhanced by the act which they repudiate. If they concede the legality and efficacy of the establishment of the town, they must also concede the rights vested in it and its inhabitants, and they will be entitled of course to their just proportion of the proceeds of sales in the town. Even in the case of mere private interests held by tenants in common of undivided land, if one co-tenant appropriates to himself a specific portion by occupation and improvement, or by sale and conveyance, such an appropriation will be so far protected in equity, that if there be enough of the other common lands to satisfy the just claim of the other co-tenants according to the original condition and value of the whole unaffected by the labor of the co-tenant who has made the appropriation, they will be thus satisfied, and the appropriation made by one, though at first without an exclusive right, will not be disturbed, unless it be necessary for effecting a just and equal partition. And neither *femes covert* nor infants are exempt from the application of this principle of equity.

1. If, therefore, Mrs. A. Alves, represented to have been the daughter and sole heiress of William Johnston, an original grantee, owning one-eighth part of the grant to Richard Henderson & Co., was, at the date of the ordinance, the wife of Walter Alves, who was a party to the ordinance, and signed and sealed it, either in virtue of her interest, or of that and others acquired by him; and if, not being bound by it, she repudiated it after her husband's death, still, as the ordinance is in fact an appropriation of the land included in the town of Henderson, by those who made it, first to themselves, or the uses appointed by them, and then to the purchasers of lots and the inhabitants of the town, and the public, there is still greater reason than in an ordinary case, to say that

1. Where one of several tenants in common aliens part of the land the purchaser will not be disturbed in his possession, if the other claimants can be satisfied as to their interest out of the remainder.

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she had no right to disturb the appropriation of the land included in the town established by her co-tenants, and held and improved by numerous individuals under them, unless it were necessary for the satisfaction of her just and equal interest in the common land, irrespective of the peculiar value of the land in the town, consequent upon its appropriation as a town. And it is only upon this condition that the Chancellor would, in 1825, have aided her in the assertion of a right inconsistent with the validity of the ordinance, or with the rights acquired under it.

But it is not proved in this case, as we understand the record, that Amelia Alves was, at the date of the ordinance, either an infant or a married woman; nor does it appear that her full interest in the grant might not, in 1825, have been satisfied in other portions of the grant, nor that it had not been so satisfied, nor that she had not received her just proportion of the proceeds of the sale of lots, or compensation for her portion received by her husband, Walter Alves, who had extensive interests in the grant; nor in fact is it shown that she ever repudiated, or attempted to repudiate, the ordinance, or to deny the authority under which the town, with its public grounds, was established and sold and conveyed and built up, or that she asserted any interest in opposition to it, except as it may be inferred from her execution of the deed conveying to the citizens all her right, title, and interest in certain lots, perhaps all of which had been sold in consideration of a deed executed by the citizens, her acceptance of which implies an acknowledgment on her part of their right in the land therein mentioned, and of the validity of the ordinance, and of the establishment of the town, under which alone they pretended to have any interest.

In a bill filed by Walter Alves in 1817, claiming from Samuel Hopkins an account and payment of money, the proceeds of the sale of lots in Henderson, the interest of Mrs. Alves, in whose right the claim is in part made, is stated as being one-sixteenth

—that is, one-half of the eighth held originally by her father, William Johnston. Walter Alves also claimed, in his own right, portions of the interests of John Williams, James Hogg, and Thomas Hart, all of whom, as well as himself, were parties to the ordinance, and thereby conclusively bound their interests into whosoever hands they might afterwards come. Two thousand dollars were paid by Hopkins to the order of Walter Alves, during the progress of this suit, which was afterwards discontinued. It is the interests of these parties, derived principally through Walter Alves, and all by acts subsequent to the date of the ordinance, that James Alves and others conveyed, or attempted to convey, to the citizens, who, or the town, already had a better title to them than he had to the interests of Williams, Hogg, Thomas Hart, and Walter Alves. Richard G. Hart, who was also a grantor in the deed of 1825 to the citizens, and a grantee in their deed, was a co-complainant with Walter Alves in the bill of 1817, and claimed for himself and co-heirs, whom he professed to represent, the interest of their father, Nathaniel Hart, an original grantee, entitled to one-eighth. The bill contains a full recognition of the validity of the ordinance, and the agency of Hopkins, and corroborates, as to Richard G. Hart, the presumptions before mentioned. He afterwards conveyed his interest in the river front to James Alves, as did also Wm. Hart, claiming to be an heir of David Hart, an original grantee of the Henderson grant, entitled to one-sixteenth. He too was a party to the bill of 1817. In 1840 James Alves also procured a conveyance of the interest of Burton, residuary legatee of John Williams in the entire grant. These deeds recite small considerations, and in fact passed nothing in the town, except such interest, if any, as Richard G. Hart acquired in the space between the river and Water street reduced, under the deed of the citizens.

Did any right, title, or interest pass by the deed of 1825, purporting to be from the citizens and lot-hold-

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ers of the town of Henderson? What right had they in the public square, and in the space between Water street reduced and the river? With regard to the public square we need not pursue the inquiry farther than to say, that whether anything passed by the deed or not, the portions of it claimed under the deed having probably been suitable for private appropriations, may be presumed, after a lapse of twenty-five or thirty years, to have been taken possession of, and so appropriated to the exclusive use of individuals claiming under the deed as to have acquired a title against the town, by length of possession. There being no proof to the contrary, it may be presumed that the grantees in the deed from the citizens have in this way realized, under color of that deed, property of considerable value.

With regard to the land between the river and Water street, the dedication of which to the use of the town and the public, so far as those who established the town, or ratified that act, could do it, is so manifest that we have not stopped, and shall not now stop, to demonstrate it. The right of the citizens and lot-owners was a mere right to use and keep it open as a common or highway, or as it is described in the deeds of 1825, a street, for access to the river, and for all the public purposes to which such a space between the lots and a navigable river, running along the front of the town, could be appropriately used by the citizens of the town, and the general public, so far as any person or persons might have occasion so to use it. And as the property of the town, it was under the general control and superintendence of the trustees, for its preservation and improvement, and for wharfage, and other appropriate profits, for the benefit of the town.

2. A portion of the grantees of the company to whom the grant was made, called Hender-

It was decided in *Buckner vs. Trustees of Augusta*, 1 A. K. Marshall, 9, that trustees of a town had no right to alien or convey such property, from the uses to which it was dedicated. And the same doctrine has been held ever since, and has been repeatedly

recognized by this court. Of course the action of the trustees upon the valuation of this property for taxes charged to Alves, did not conclude the town as to the title ; and especially when Alves claimed that the estimates should be low, because his title was disputed. We think it very clear that a conveyance from a portion, and, as we are inclined to think, even from all of the citizens, must be equally inoperative. It is as public property that the citizens of the town, and all others, have the right to use such property. The right of individuals in it is a mere right to use it, in subordination to the public right. This right of use belongs equally not only to lot-holders but to all inhabitants, and to all individuals of the State, according to their various necessities or convenience; and it is a right which belongs to future as well as to present lot-holders and inhabitants. If one citizen or lot-holder should attempt to convey his individual right to another, it is difficult to conceive that his own right to the use would be diminished ; and even if, by estoppel or otherwise, it should be extinguished, we do not perceive that this could operate to enlarge the right of the grantee, who had already as much right in the proper uses of the street or common as he can have or enjoy, and as every other citizen also had. And if it were admitted that all the inhabitants could, by their joint deed, destroy or extinguish the public right, which we do not admit, it seems to be evident that a conveyance, by any number less than the whole, could not affect the rights of those who did not convey, and could not change the nature or the character of the property, which would still remain dedicated to the common and public use of all others, if not of those who made the deed ; whence it follows that a conveyance, or attempted conveyance, of this right, by any portion, would not enlarge the rights or interest of the grantee ; and when it is considered that the right of use pertains to the larger public, outside of the town, and to all persons in it, without regard to age or sex, or disabil-

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son's grant, (see 3 *Littell's Laws of Kentucky*, p. 585,) by an ordinance, set apart a portion of the grant for the town of Henderson, by a plan set forth in a plat, in which public grounds, streets, alleys, were laid down : held, that the public grounds, streets, alleys, and the space between the lots and the Ohio, were dedicated to public use.

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ity, there seems to be no way of extinguishing this common right, by the act of individual citizens, while the town itself remains. We are satisfied, therefore, that the deed of 1825, executed by a minority of the lot-holders, and by a part only of the citizens, passed nothing to the grantees, and invested them with no rights in addition to those which they before had. And as the act of the Legislature of January, 1827—*Session Acts*, 50—ratifies the arrangement, of which this deed was a part, so far only as it affected the interest of the parties to it, the deed, however efficacious it may have been made as between the parties, is even, under the operation of the statute, wholly ineffectual as to other parties; and as all who were not parties have precisely the same rights which they would have had if the deed had not been made, for no one derives from the makers of the deed the right to use the streets and public grounds of the town, it follows, that even under the operation of the act, if it be operative at all, the grantees acquired no right to use the public grounds to the exclusion of other individuals, or of the public. Even if the act be effectual to reduce the width of Water street to 125 feet, it does not, in so doing, profess to revoke the dedication, nor was it competent for the Legislature to do so, since that would have been taking away the property of the town and its citizens.

3. It is not competent for the citizens of a town, by deed, to transfer to an individual the title to, or exclusive use of, the streets, alleys, and public grounds dedicated to the use of the public.

It is however contended, that although the deed was not executed by all it was, in fact, approved by all the citizens; that all derived the benefit of the arrangement and compromise, of which it was a part; and that from lapse of time, and general acquiescence of the citizens in the claim and possession of James Alves, under the compromise and deed of the citizens, it should be presumed that they admitted and assented to his title, and to the legislative act by which it was confirmed. But if it be doubtful as to the effect of a deed executed by all of the male adults of the town, it seems entirely certain

that mere acquiescence in the deed which could affect only the rights of the parties to it, and purported nothing more, could not give to it a more extensive operation. The same remark applies to the act of the Legislature, which, besides reducing Water street, which might only distinguish it from the residue of the common property, ratified the arrangement or compromise so far only as it affected the rights of the parties to it. There is, however, no evidence that this act was passed on the general application of the town, or that at its date, or any time since, either its existence or its terms were known to all or a majority of the inhabitants; nor is there any evidence of universal acquiescence in the claim or possession of Alves, or of such possession on his part as excluded the public from the actual use of all portions of the land now in contest, and as might, by a continuance for twenty years, defeat the public right and perfect his own.

It is true that since about the year 1828, James Alves having acquired from the claimants under the deed of the citizens, or most of them, their interest in the slip between Water street reduced and the river, has either occupied or leased or sold, under claim to the whole, certain defined portions of it. Before the commencement of this claim however, and during the entire period since, the town, its inhabitants, its municipal authorities, and the public generally, according to their necessities and occasions, have made the appropriate use, and exercised the appropriate acts of ownership over all accessible public portions of the same slip or river front which were not, at the time, in the adverse possession of Alves, or those claiming under him, by exclusive occupancy, or by actual inclosure, by which the public or common use was actually excluded. With the exceptions thus indicated the inhabitants and others have, at all times, used this space at pleasure, not only for common access to the river, but by digging and hauling away sand from the banks, by loading and un-

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4. A citizen of a town, by enclosing and holding adversely for twenty years, may acquire exclusive right to a portion of the public grounds dedicated to public use, but the possession and use must be adverse and the use exclusive.

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loading boats at any part of the shore, by using it for building and launching boats, and by collecting, under the authority of the town, wharfage from boats landing and lying at any place on the shore from the upper to the lower end of the town. And with the exceptions before made there has been no difference in the manner and extent of these uses, before and since the arrangement of 1825, unless it be that the charge of wharfage had not previously been made. This being the appropriate uses by which the public right to the space in question, as being dedicated to the use of the town and the public, for a street or common, would be properly asserted and maintained, we think it is entirely clear that the public right could not be ousted by a mere claim of title or possession, or by anything less than an actual private occupancy or exclusive use, evidenced by inclosure, and that it could not be defeated except by a continued adverse occupancy, or exclusive possession thus evidenced during twenty years before the assertion of the public right by suit or action. To this extent only is it understood that in the case of *Rowan's ex'ors. vs. Portland*, 8 B. Monroe, 259, the public right was held to be barred by an adverse possession of twenty years. Applying this test in the present case we are satisfied, from a careful examination of the testimony, that although there may be certain portions of land between the river and Water street reduced, of which there has been such a possession as bars the public, and although some of them may have been held under claim derived from Jas. Alves, there was not, at the commencement of this suit, in October, 1850, or at the time of filing the answer of James Alves to the cross-bill of the trustees, in 1852, any part of the disputed land then in the possession of himself or his tenants, by inclosure or actual occupation, which had been so in possession, continually, for twenty years preceding either of these dates. The owners or claimants of any portions of the land of which there may have been an exclusive posses-

sion at the commencement of this litigation, not being before the court, or parties to this suit, except James Alves, and his representatives since his death, the interests of no others are affected by the decree, which, under the views expressed in this opinion, is deemed correct.

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On the whole case it appears, that of the interests set up by Alves and other claimants in 1825, all were either bound by the ordinance, and the acts done under it, or barred by time, unless the doubtful interest of Mrs. Amelia Alves be an exception.—Doubtless the assertion of a large claim by Alves and others, against the town, just when the citizens, to get clear of the harassment and unfavorable influences of a litigation, in which they had been involved by another claimant, had agreed to quiet his claim by a compensation in money, produced an alarm for their interests and those of the town, under which many of them, for the sake of peace, and to avoid a litigation which, in any event, would retard the growth of the town, were willing, without much investigation, to purchase quiet and repose by the alienation of portions of the public property. If they had not the power to do this, and if, as we have decided, their deed was ineffectual for the purpose, it has not been made manifest in this case that they obtained much advantage by the conveyance of Alves and others to the citizens. At any rate, before it could be assumed that the nullity or the nullification of the deed from one party to the compromise, operated as a great hardship upon the other, because he cannot now be placed in *statu quo*, it should be shown that something substantial passed from that party in the compromise, and that no fair compensation has been received for it under color, and by the conceded operation of the void deed. But nothing of this appears. It is not shown that even Amelia Alves had any claim available against the town, or that she intended to assert any by litigation, or that there would, in fact, have been any litigation upon

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the claims involved in the compromise. Nor is it shown that nothing considerable has been realized under the deed from the citizens, or that what has been claimed under it can be restored.

Wherefore, the decree is affirmed.

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PET. EQ.

APPEAL FROM KENTON CIRCUIT.

1. Petition in equity, filed against Jack & Co., consisting of Jack, Goodall, Dean, and Haven, attaching a tract of land in Lewis county; process served on Jack and Haven—the other defendants non-residents—and dismissed by the Circuit Court: held that plaintiff was entitled to judgment against the defendants served with process in the county where the suit was brought. (*Lansdale vs. Mitchell*, 14 B. Monroe, 348.)
2. The 93d section of the Code of Practice has no application to a case of an attachment sued out in one county, where defendant is served with process, and seeking the sale of land in another county; but such proceeding is governed by the 106th section, which authorizes the action to be brought in any county where the defendant resides or is served with process.
3. By section 474 a judgment creditor, having an execution returned "no property found," may institute equitable proceeding in the court from whence the execution issued, or in the court of any county in which the defendant resides or is summoned.
4. The question whether two witnesses is necessary to overturn the statements of an answer, under the Code, stated but not decided.
5. A witness, though party to the suit, having no interest however in the questions in issue, held competent to testify.

The facts of the case are stated in the opinion of the Court. *Rep.*

Benton & Kinkead, and *Moore & Wallace*, for appellant—

We suppose the Kenton Circuit Court had jurisdiction of the case, under the 106th section of the Code. One of the defendants, Haven, resides in that county, and in that county Haven and Jack were served with process. That section provides: "That

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every other action may be brought in any county in which the defendant, or one of several defendants resides or is summoned." The jurisdiction is undoubted, unless some other section requires the action to be brought in the county where the land lies. The 93d section requires the action "to be brought in the county in which the subject of the action, or some part thereof, is situated"—(3d sub-section,) "for the sale of real property under a mortgage, lien, or other incumbrance or charge." We do not proceed under this section. We suppose it only applies to such incumbrances as exist before the commencement of this action. We are not proceeding "to enforce a mortgage, lien, or other incumbrance or charge." We seek to charge the land by the attachment, which had no existence prior to the institution of the suit. The recovery of the debt is the object of the suit; and to give judgment for the debt the jurisdiction is not questioned.

The same reasoning applies to section 105 of the code, which provides that suit may be brought against a non-resident in any county in which there may be property of the defendant, or debts owing to the defendant.

The jurisdiction is clearly made out by the service of process, and residence in the county where the suit is brought of some of the makers of the note; and having jurisdiction for one purpose, has it for all purposes. This is still more obvious from the very general and comprehensive language of the 221st section of the code; which provides, "that the plaintiff in a civil action may at or before the commencement thereof, have an attachment against the property of the defendant." For the reasons thereafter stated, and the fact that non-residence is one ground of the attachment. Certainly under the 106th section suit could have been brought against the makers of the note, though they were all non-residents, and service of process on them in Kenton, or any one of them gave the court jurisdiction, and

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having jurisdiction could issue attachments to any county in the state. It cannot prejudice the case that the attachment was asked at the institution of the suit.

The first ground of demurrer specified in section 120 of the Code of Practice, "that the court has no jurisdiction of the person of the plaintiff or subject of the action." Section 123 provides that, "where any of the matters enumerated in section 120 do not appear upon the face of the petition, the objection may be taken by answer. If no such objection is taken, either by demurrer or answer, the defendant shall be deemed to have waived the same, except only the objection to the jurisdiction of the court over the subject of the action, and the objection that the petition does not state facts sufficient to constitute a cause of action. In this case there was no demurrer, and there not being "the subject of the action," there can be no doubt that the court had jurisdiction, and the defendants must be deemed to have waived all objections thereto.

The pleadings under the code being all sworn to by the parties, the rule which required two witnesses to counteract the denial of an answer, has no application, and does not apply in this case.

The money having been paid by Jack & Co., and the conveyance being to McLean, the latter holds in trust for the former, who paid the price. (2 *Story's Equity*, 1201; *Perry vs. Head*, 1 *Mar.* 47.)

Whatever may be Haven's condition, Fry is a competent witness. By section 670 of the Code of Practice, "persons interested in an issue in behalf of themselves, and parties to an issue in behalf of themselves, or those united with them in the issue," are declared incompetent. Fry occupies neither of the positions specified, and was therefore competent, and it was error to exclude his testimony.

Whatever may be the conclusion of the court in regard to other branches of the case, the plaintiff was certainly entitled to judgment against Jack and Ha-

ven, who were served with process in the county where the suit was brought. (See *Code of Practice*, sections 308, 398, 402.)

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But if it was proper to dismiss the suit, it should have been without prejudice to another action. (*Berry, &c., vs. Rogers, &c.*, 2 *Bibb*, 316; *Foster vs. Hunt, &c.*, 3 *lb.* 33; *Miller vs. Hall, &c.*, 3 *Monroe*, 243; *Lewis vs. Forbes' heirs*, 4 *J. J. Marshall*, 190; 3 *Bibb*, 229; 13 *B. Mon.*, 170.

There was no personal service on McLean.

J. W. Stevenson, for McLean—

Argued that the decree as to McLean was correct.

1. The court had no jurisdiction. In a case seeking to subject the land of a non-resident before passage of the Code, the suit must be in the county where the land lay. If effects were to be subjected, in the county where the effects were found, or the defendant was found. (13 *B. Mon.*, 208.)

There was no personal service on McLean, and the land lies in Lewis county.

By the Code of Practice it is expressly provided that "actions for the sale of real property under mortgage, lien, or other incumbrance or charge," must be brought in the county in which the subject of the action or some part thereof lies. (*Code of Practice*, section 93, page 26.) But it is argued that because Jack and Haven were each summoned in the county where the suit was brought, that gave the court jurisdiction. Were this true, the whole purpose of the Code would be defeated; a party would only have to assign a note or make a nominal defendant to defeat the use and salutary purposes of the enactment. It is supposed that provision was for the protection of purchasers of real estate. That the records of the county in which the land is situated should show the evidences of title. An attachment is in every sense an incumbrance and charge.

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2. On the merits of the case. McLean denies that ever Jack & Co., had any interest in the land attached, or that he holds the same in trust for them. There is no proof on the subject except the testimony of Haven and Fry, who are both incompetent witnesses. Minor, the other witness, details mainly what he heard from others; but if his evidence was direct in point, it could not avail. There are facts and circumstances corroborating his statements, and the rule which requires two witnesses, or one and corroborating circumstances to overturn the denials of the answer is not changed by the code as plaintiffs counsel suppose.

As to the error alleged in not rendering a personal judgment against Haven and Jack, McLean has no interest.

September 28.

Judge SIMRSON delivered the opinion of the Court.

This action was brought by the plaintiff, Nixon, in the Kenton Circuit Court. He alleged in his petition that he was the holder of a note for \$3,019 03, which was executed on the 10th day of December, 1851, to Samuel Cloon, by the firm of James P. Jack & Co., and which had been assigned to him by Cloon the payee thereof; that at the time said note was executed the defendants, Jack, Goodall, Dean, and Haven, constituted the firm of Jack & Co., and that no part of the said debt had been paid. He also alleged that the firm of Jack & Co., owned a tract of land in Lewis county in this state, which had been conveyed by Bush, the former owner thereof, to the defendant McLean, who held it in trust for them, they having paid all the purchase money; and that the deed to McLean was fraudulent and void as to the creditors of Jack & Co. He also states that when the land was purchased and conveyed to McLean, the firm of Jack & Co. was composed of the same members of which it was constituted at the date of the note, with the exception of Dean, whose place in the firm was then occupied by the defend-

ant Fry, whò was entitled to one-fourth of said tract of land, and therefore the plaintiff only sought to subject the other three-fourths thereof to the payment of his demand.

Process was executed in the county where the action was brought on the defendants Haven and Jack, and the other defendants were proceeded against as non residents.

The defendant, McLean, filed his answer, in which he claimed at his own property the land in Lewis county, conveyed to him by Bush, and denied that the purchase money had been paid by the firm of Jack & Co., or that they had any interest in the land.

The Circuit Court having dismissed the plaintiff's petition, without even rendering a judgment in his favor against the defendants who were served with process, he has appealed to this court.

The plaintiff was entitled to a personal judgment against the defendants who had been served with process, even if he failed to establish his right to subject the property attached to the payment of his debt. If he were not entitled to any equitable relief, still, as he had a right to a personal judgment against part of the defendants, the court erred in dismissing his petition against them. The case as to them should have been transferred to the proper docket, and a judgment rendered against them. (*Lansdale vs. Mitchell*, 14 B. Mon., 348.)

But the principal object of the plaintiff was to subject the land in Lewis county to the payment of his demand. It was the only property mentioned in his petition as belonging to the defendants, and the only property on which the attachment had been levied.

To sustain the judgment it is contended that the Circuit Court had no jurisdiction to order a sale of the land in Lewis county, that an action for that purpose is local, and must be brought in the county where the land lies.

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1. Petition in equity filed against Jack & Co., consisting of Jack, Goodall, Dean, and Haven, attaching a tract of land in Lewis county; process served on Jack and Haven—the other def'ts non residents—and dismissed by the Circuit Court—held that plaintiff was entitled to judgment against the defendants served with process in the c'ty where the suit was brought. (*Lansdale vs. Mitchell*, 14 B. Mon., 348.)

2. The 93d section of Code of Practice has no application to a case of an attachment sued out in one county, where

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defendant is served with process, and seeking the sale of land in another county; but such proceeding is governed by the 106th section, which authorizes the action to be brought in any city where the defendant resides or is served with process.

To sustain this position the 93rd section of the Code of Practice in Civil Cases is relied upon. That section provides that actions for the following causes must be brought in the county in which the subject of the action, or some part thereof is situated. One of the causes enumerated is for the sale of real property under a mortgage, lien, or other incumbrance or charge.

But this action was not brought for the sale of the land in Lewis county, under a mortgage, lien, or other incumbrance or charge. None was set up or asserted by the plaintiff. An existing incumbrance or charge on the land is evidently here referred to—one to which it is subject, and for the enforcement of which the action is brought. In this case the action was instituted, not to sell the land for an existing charge, but for the payment of the plaintiff's demand for which there was no lien, incumbrance, or charge upon the land. The levy of the attachment created a *quasi* lien upon the land during the pendency of the action. But that lien was created merely for the purpose of securing the property so that it might be subject to the final judgment of the court; and the action cannot, with any propriety, be said to have been brought to sell the land under a lien which had no existence at the time it was commenced. This action cannot, therefore, be regarded as being embraced by the 93rd section of the code. It comes within the operation of section 106, which authorizes the action to be brought in any county in which the defendant, or one of several defendants resides, or is summoned. If all the defendants had been non-residents, and none of them had been summoned in the county in which the action was brought, then according to section 105 it should have been brought in the county in which the land is situated. But as two of the defendants were summoned in the county of Kenton, the action was properly brought in that county, and the court below had complete jurisdiction over the whole case.

It is not contemplated by the Code that every action brought to subject land to the payment of the plaintiff's demand, shall be brought in the county where the land lies, and in no other county. By section 474 a judgment creditor having an execution returned no property found, may institute an action by equitable proceedings in the court from which the execution issued, or in the court of any county in which the defendant resides or is summoned, and have any interest in land, legal or equitable, belonging to him, situated in any county, subjected to the payment of the judgment at law.

The depositions of Fry and Haven, two of the defendants, having been excluded by the court below, on the ground that the witnesses were interested on the part of the plaintiff, and incompetent to testify in his behalf, there remained but one witness to sustain the plaintiff's claim in opposition to its positive denial by the defendant in his answer.

It is contended that the rule of law which requires the testimony of two witnesses, or of one witness and strong corroborating circumstances to overcome in a court of equity the positive denial of the defendant in his answer, should be regarded as having been abrogated by the Code of Practice, inasmuch as the pleadings on both sides, must, according to its provisions, be sworn to by the respective parties in actions by either ordinary or equitable proceedings.

On the other side it argued that there is no indication in the Code of any legislative intention to change this established rule of practice, that on the contrary, it is expressly provided in section 142, which requires a verification of the pleadings by the affidavit of the parties, that such verification shall not make other or greater proof necessary on the side of the adverse party, and that this provision authorizes the conclusion that no change in the rules of evidence was intended to be effected by the requisition that the pleadings of the parties should be sworn to by them.

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3. By sec. 474 a judgment creditor, having an execution returned 'no property found,' may institute equitable proceeding in the court from whence the execution issued, or in the court of any county in which the defendant resides or is summoned.

4. The question whether 2 witnesses is necessary to overturn the statements of an answer, under the Code, stated but not decided.

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If the testimony of one witness was insufficient in this case to authorize a judgment for the plaintiff against the defendant McLean, then it would be necessary to determine whether the other two depositions were properly excluded, or whether either of the witnesses was competent to testify for the plaintiff. But if either one of the excluded witnesses was competent, it will be unnecessary to decide in this case whether the rule of law referred to has been changed by the Code of Practice or not, as in that event there will be two witnesses testifying in opposition to the statements contained in the answer.

As the defendant Haven, was one of the partners of the firm of Jack & Co., when the note sued on was executed, and as the effect of his testimony would be to subject property claimed by a third person to the payment of a debt for which he is liable, and thereby exonerate himself, it is perfectly evident that he is interested, and his deposition was properly excluded.

5. A witness, though party to the suit, having no interest however in the questions in issue, held competent to testify.

The other witness, Fry, however, is not liable for the plaintiff's debt, not having been a member of the firm of Jack & Co., when it was created. He has no interest in having it paid. He claims, it is true, part of the land which the plaintiff is attempting to subject to the payment of his debt. The success of the plaintiff, and the right of the witness both depend upon the establishment of the alleged fact, that the land actually belongs to Jack & Co., and is held in trust for them by the defendant, McLean. But the witness has not asserted his claim to the land in this action, nor can any judgment be rendered therein in his favor against his co-defendant McLean. The issue made up in the action is between the plaintiff and McLean. A judgment in favor of the plaintiff cannot be used by the witness in any subsequent litigation between him and the defendant McLean. He is a party to the record, but he is not a party to the issue, nor directly interested in it. He could not have appealed from the judgment dis-

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missing the plaintiff's petition although he is a defendant. He is a necessary party to the action, only because, according to the statements in the petition, he is the owner of one undivided fourth of the land the plaintiff is attempting to subject to the payment of his debt. But as the right of the witness is conceded by the plaintiff, and there is no controversy between them, either with respect to this fourth part, or any other interest therein claimed by the witness, he has no direct interest in the subject matter in issue between the other parties, and is a competent witness for the plaintiff. (1 *Greenleaf on Evidence*, page 562.)

There is no testimony that Haven has transferred his interest in the land to the witness—Haven's deposition having been excluded. But if the fact appeared in the cause, it would not affect the question of his competency, inasmuch as he has not asserted the claim in this suit, and could not use the judgment in this case, in any action which he might hereafter bring for its establishment. Besides the effect of his testimony will be to subject this part of the land to the payment of the plaintiff's demand, to the prejudice of any interest which he claims in it as the assignee of Haven.

When the testimony of this witness is admitted, the fact that the defendant McLean purchased the land for Jack & Co., as their agent, and paid for it with their property is fully established. Consequently the plaintiff is entitled to a judgment for the sale of three-fourths of said land, or for so much thereof as may be necessary for the payment of his debt and costs.

Wherefore, the judgment is reversed, and cause remanded for a judgment in conformity with the principles of this opinion.

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Case 13.

Robert J. Ward vs. City of Louisville.

ORD. PET.

APPEAL FROM JEFFERSON CIRCUIT.

The city of Louisville is not responsible for injuries done to private property by a mob. (*Prather vs. City of Lexington*, 13 B. Monroe, 559.)

The facts of the case are stated in the opinion of the Court. *Rep.*

Wolfe & Poindexter for appellant—

This action was brought in the Jefferson Circuit Court to recover from the defendant damages for an injury which was done to the dwelling house of the plaintiff by the violence of a mob.

At the time this action was brought the plaintiff was fully aware of the decision of this court in the case of *Prather vs. City of Lexington*, 13 B. Monroe, 559; but the case under consideration, and that of *Prather vs. City of Lexington*, are so different in many material points, that this court may, in our humble judgment, reverse the judgment of the court below, and do no violence to the decision in the case of *Prather*. This case is presented on the judgment of the court below sustaining a demurrer to the plaintiff's petition.

The allegations of the petition are to be taken as true, and the question arises does the plaintiff set forth a sufficient cause of action? We maintain he does. The Court of Appeals, in the case of *Prather vs. City of Lexington*, page 502, uses this language: "If the city be liable, in her corporate capacity, for outrage committed by the mob, which occasioned the injury to the plaintiff's property, it can only be upon the ground that the existence and lawless intention of the mob were known to the Mayor and Marshal of the city, and that they neglected or refused to use any means, or to make any efforts to prevent the perpetration of

16m	184
89	282
16bm	184
115	11
115	12

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the unlawful act, which could have been prevented by them." They further say that the plaintiff's declaration fails to allege that the existence of the mob and its intention were known to either of these officers, or that any application was made to them for their assistance on the occasion, &c.

The petition in the present case contains all these important allegations. It charges that the lawless intention of the mob was known to the Mayor and Marshal of the city of Louisville; and it further charges that these officers neglected to use any means to prevent the perpetration of the unlawful act. It further alleges, that the plaintiff made application to the Mayor for assistance to protect his property, which the Mayor failed to render, and the consequence was that the property was greatly injured.

The declaration in the case of *Prather vs City of Lexington* was fatally defective, because of the omission of the above important allegations.

This case presents the facts that the Mayor and Marshal of Louisville had notice that there would be a mob, and that they made no preparation to suppress it. The aid of the authorities of the city was asked by the plaintiff, for the protection of his wife, children, and home, and yet no assistance was rendered. A lawless mob ruthlessly assailed the dwelling of the plaintiff, and set fire to it, and the arm of the civil authority was never seen. An ordinance of Louisville authorized and required the Mayor, as the chief executive officer of the city, to call out the military to suppress violence, and yet no call was made on the military by the Mayor, although he was apprised of the designs of the mob.

We refer the court to ordinance No. 31, page 80, Revised Ordinances of the city of Louisville, 1854; it reads thus: "Whenever the Mayor shall deem it
' necessary, in order to enforce the laws of the city,
' or to avert, or save life or property, in case of ca-
' lamity, he shall summon into service all, or so many
' of the citizens as he may judge proper, and such

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' summons may be by proclamation or order, addressed to the citizens, or to companies, classes, or districts, specified therein." After providing for the imposition of a fine should the citizens disobey, the ordinance proceeds: "It shall be the duty of the Mayor to watch the indications of any threatened or meditated breach of the laws, or occurrence of calamity, and to exert these powers in time, if practicable, to avert them."

By requiring all this of the Mayor the corporation assumed the protection of the life and property of the citizen. The ordinance is a proclamation to every citizen within the limits of the corporation, and to every one who shall become a citizen, that the powers of the corporation shall be exerted in his behalf if the necessity should arise to require it.

No such ordinance as this was known to the city of Lexington. The Mayor of Lexington had no authority to call out the military, or other force, to suppress a mob. The charter and ordinances of Lexington were silent on that subject.

There is then, we maintain, a marked distinction in the powers conferred in the two cases, and this, in our opinion, should make a difference in the judgment which the court should render. In the case of *Prather vs. City of Lexington*, the court say: "The tenure of the office of Mayor is fixed by the statute; he is commissioned by the Governor of the Commonwealth, and the corporation has no power to remove him." Now the Mayor of Louisville is not appointed by the Governor; he is elected by the qualified voters of the city; nor is he removable as a State officer is removed, but is removable from office by the Board of Alderman, sitting as a court, upon charges preferred by the Board of Common Councilmen. It certainly would not be unreasonable that the city, in this case, should be responsible for the omissions of duty of the Mayor, because her qualified voters elect him, and her Board of Alderman remove him. Although we grant, and fully concur

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with the Court of Appeals in what they say in the case of *Prather vs. City of Lexington*, that it is a reason why the corporation should not be held liable, where the Governor appoints the Mayor, and where the corporation has no right to remove him. (13 B. *Monroe*, 563.)

But this court took occasion to say that it decided the case of *Prather* on broader grounds. It held that the corporation is not liable for such delinquencies of its officers, as their omission to suppress a mob. The court did not, in strictness, hold that doctrine, because the only point that was presented for its decision was that which arose on the demurrer; but it held the language that the corporation is not liable for the personal delinquencies of its officers. We think we can show reasons why a corporation should be held responsible for the acts of a mob. It cannot be supposed that the Legislature intended to confer a mere unmeaning title by granting a charter for a municipal corporation. Some reason or dictate of policy must have prompted its creation. It must have been in the contemplation of the Legislature to better secure some rights in consequence of the additional burdens that are imposed on the citizens of a corporation. One of the greatest objects that could be accomplished by the creation of a corporation, is the organization and establishment and support of a strong and effective police. It is an undeniable fact that citizens of a city are subjected to burdens unknown to citizens of the Commonwealth residing in the country. Each citizen has to contribute, in proportion to the value of his property, to pay for the paving and grading of streets contiguous to the property. His taxes are necessarily burdensome in having to pay for the employment of a Mayor, Marshal, police, &c., and what better equivalent could he get in return than the perfect protection of his property from the assaults of lawless men.

A charter is granted conferring franchises and powers, and imposing liabilities. One of the powers

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given is the right to compel the citizens to pay taxes. As a citizen then is compelled to give up a portion of his property, there must be compensation returned or secured, for the organic law provides that no man's property shall be taken from him without he has first secured its full and undoubted value.—What return shall be made to the citizen for imposing on him the burdens which he encounters as a citizen of a corporation? There is but one answer, and that is, the support of a strong and effective police. As this is the great duty imposed, and this the compensation which must be made to the citizen for the confiscation of his property, it follows that this duty must be discharged, for the corporation has duties to perform, in other respects, which may enforced, as those of an ordinary citizen.

Modern decisions are numerous on the point of the liability of corporations for the negligence or unskillfulness of their agents, in the construction of public works. (See *Ross vs. City of Madison*, 1 *Smith*, 98; *Mayor of Memphis vs. Losser*, 9 *Humph.*, 757; *Mayor vs. Furze*, 3 *Hill*, 412; *Mayor of Linn vs. Turner, Cowan*, 86, which, although not a modern decision, is yet to the point.)

The present case presents the most signal evidences of negligence on the part of the officers of a corporation, that the history of a country records. The Mayor is armed, by the laws of the city, with all the authority necessary to suppress a mob, and he does not, to the least extent, exert that authority. He is fully informed that a mob was about to assemble, and he uses no precaution to prevent it.—To throw the citizen upon the official bond of the officer, for redress, is virtually to place in his hands a barren sceptre. The official bond of the officer is no protection to the rights of the citizen. It is necessarily very small, whereas the loss to the citizens, by the violence of a mob, may amount to hundreds of thousands of dollars. In the present case our city was disgraced by the doings of a lawless multi-

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tude, which was prepared for murder as well as arson. Maddened by a frenzy that knew no bounds, it drove from their peaceful home women and children, whose blood would have marked their retreat if hasty flight and concealment had not foiled their pursuers. Justice appeals loudly for redress, and that redress can only be found in the subjection of the corporation to the payment of damages that will teach a lesson which, in the future, may prevent the recurrence of scenes too disgraceful for decency or morality to contemplate with composure.

We respectfully ask the court to reverse the judgment of the court below.

R. J. Elliott for appellee—

In support of the correctness of the judgment of the court below, I hardly deem it necessary to refer this honorable court to the case of *Prather vs. City of Lexington*, 13 B. Monroe.

Chief Justice MARSHALL delivered the opinion of the Court.

September 26.

This action was brought to recover from the city of Louisville damages for injuries to the house of R. J. Ward, in said city, committed by a mob. The statements of the petition are substantially the same as the facts stated in the case of *Prather vs. City of Lexington*, 13 B. Monroe, 559, except that, after stating that the "Mayor, Marshal, and other officers neglected and refused to call in the requisitions of the law, and all necessary aid to protect the property aforesaid from the violence of the mob, and neglected and failed to suppress it," these words, which seem to be more specific than those used in the case referred to, immediately follow: "Although the existence of the mob, and its intention were on the day and year aforesaid known to the Mayor of Louisville, to the Marshal of said city, and although notice was given to the Mayor of said city that the mob aforesaid would assemble, and although on the day and year aforesaid application was made by the

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plaintiff to the Mayor of said city to protect said dwelling house, and assistance asked of the Mayor to prevent said mob from injuring said house."

In a second count or statement the case is somewhat aggravated, but so far as respects the sufficiency of the facts to sustain the action, it is not materially varied by the statement of the necessity that the plaintiff's family should fly, and their actual flight, to escape the violence of the mob. And it states the notice to the Mayor to have been on the night of the assemblage of the mob, that it was about to assemble, and that in requesting assistance and protection from the Mayor, he was informed that the plaintiff was unable to protect the house from the mob. A demurrer to the petition was sustained, and a judgment having been rendered in bar of the action, the plaintiff has appealed to this court.

The general question as to the liability of a city, in its corporate capacity, for injuries to the person or property of its citizens, occasioned by the violence of a mob, is so fully discussed, the principles applicable to it so clearly stated, and opinion of this court so decidedly expressed against the liability on the ground both of principle and authority, that we deem it is scarcely necessary to say more upon that subject than that our opinion remains unchanged, and that if there be injustice or hardship in the operation of the law as we understand it, and as it is pronounced to be in the case referred to, the remedy lies with the legislative and not with the judicial power of the commonwealth. The protection of person and property, is no doubt a principal object of every good government, and as being most essential to the welfare and prosperity of its citizens should be the primary object of its laws. But there are also other objects to be effected by governments, general and local. The more dense, and numerous, and mixed population of a city, affording greater opportunities and temptations to commit injuries, requires more efficacious means of protection. The

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means and the mode of applying them are to be prescribed by the sovereign authority in creating the corporation. Their application as well in the emergencies which might require peculiar promptness and energy, as in the ordinary state of things must depend upon the officers and agents who are entrusted with the exercise of the municipal powers. It is for the corporation or corporators, where the selection of these officers and agents is entrusted to either of them, to appoint persons to the number authorized, or in reasonable numbers, and of reasonable competency, and if entrusted with the power of removal, to remove, in the appointed mode, such as are incompetent. And even if it were admitted to be the duty of the corporation as such to protect, from lawless violence, the persons and property of its citizens, a breach of this duty could not arise, or be shown, except in the failure by its general legislation and appointments to supply the appropriate means, or in its failure, in particular emergencies, under proper notice, and with sufficient opportunity for action, to call forth and put in motion, in the proper direction, such appropriate force and means as the occasion might require, and as it might be authorized to use.

This is in substance the proposition contained in the opinion rendered in the case of *Prather vs. the City of Lexington*, and which seems to be relied on as laying a basis for the responsibility of the city on the facts stated in this petition. That proposition is, that if the city is liable in her corporate capacity, it can only be on the ground that the existence and intention of the mob were known to the Mayor or Marshal, and they neglected or refused to make any efforts to prevent the unlawful act which could have been prevented by them. This of course implies that they failed to use the means in their power by which they could have prevented the act complained of, and that they had notice of the intention to commit the act in time to have prevented it by the proper use of the means in their power. Even up-

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on this hypothesis as to the liability of the city, the declaration was held bad because it did not show how and when, and to which of the officers the notice was given. And if this had been shown, the question might still have arisen whether, upon the notice given, the injury could have been prevented.

It is clear, however, that this proposition, which is made the test of the declaration, is stated as a hypothesis, and not as a direct annunciation of the opinion of the court as to the liability of the city, upon the facts stated to be necessary. It is, that if the city is liable at all it, could only be by the existence of certain facts, which, not being shown in the declaration, that would be insufficient even upon the hypothesis assumed. And as that hypothesis is clearly inconsistent with the general principles positively stated in the opinion, it is more correct to say that the case was decided upon these principles, and that it declares and establishes them, than that it went off because the declaration did not show when and how, and to whom the notice was given.

But even if the case should be considered as establishing nothing more than that a declaration in such a case should show when and how, and to whom the notice was given. What object could there be in making this requisition, except that it should be made to appear that the notice was given in such manner, to such person, and in such time as to require the corporation, through its proper organs, to act for the prevention, or at least the mitigation of the injury, and to give an opportunity of doing so by the proper use of the means within their power, and which it was their duty to use for the purpose. And although the petition is somewhat more specific in this case than the declaration was in the other, it omits to state the manner of the notice, nor does it state the time of the notice so as to show that it was such as would have enabled the officers notified to use with effect the means of defense or protection

within their power, or that they could by those means have prevented the injury. The petition is therefore defective even when subjected to this test.

But as was done in the case before referred to, we decide this question upon the broader ground that it is not shown that the city in her corporate capacity has been guilty of any breach of duty, and that she is not liable for the delinquencies or failure of her executive and ministerial officers to perform their duties in the preservation of the peace and good order of the city; that upon the general principles of law she is not responsible for injuries committed by lawless individuals or mobs, and is not made responsible by statute. And that the petition, as it does not show either that any illegal act has been done under her authority, or that she has been guilty, as a corporation, of any breach of legal duty by which she has incurred responsibility for the injuries complained of by the plaintiff, the declaration does not show a cause of action against her, and was therefore properly adjudged bad on the demurrer. We refer to the case of *Prather vs. the City of Lexington*, and the authorities there cited.

Wherefore, the judgment is affirmed.

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vs.
CLEMENT.

The city of Louisville is not responsible for injuries done to property by a mob. (*Prather vs. City of Lexington*, 13 B. Monroe, 559.)

Bullitt vs. Clement.

Case 14.

APPEAL FROM JEFFERSON CIRCUIT.

ORD. PET.

1. When a slave is brought before a justice of the peace as a runaway slave, it is the duty of the justice to determine whether or not he be a runaway, and whether the person apprehending the slave shall deliver him to the owner or to the jailer of the county. (*Revised Statutes*, 636, in connection with the act of 1798, *Stat. Law*, 1411.)
2. Though the warrant issued by the justice in such case, may not conform literally to the requisitions of the statute, if the omission be not material or prejudicial to the owner of the slave he cannot complain.

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3. A justice is not bound to regard the statements of a slave apprehended as a runaway, as evidence; nor is it admitted that a justice is responsible for an error of judgment in committing a slave as a runaway, where there is no malicious or improper design.

The facts of the case are stated in the opinion of the court. *Rep.*

Bullitt & Smith for appellant—

The only question for discussion is whether or not the slaves were runaways, and whether appellee did not know their owners, and whether he had a right to order them to be imprisoned. The doctrine exempting judicial officers from errors of judgment is not questioned where they have jurisdiction; and that a justice occupies a position as favorable as the highest judicial officer. What we contend for is, *that where a judicial officer exceeds his jurisdiction*, by doing an act which he has no authority to do under any circumstances, and the error and excess of jurisdiction appear upon the face of his proceedings, the proceeding is void, and the officer liable as any other individual would be for a similar act. In this we are sustained by numerous authorities.

The only authority for the appellee is the 93d chapter of the *Revised Statutes*, 686. Under that act, where a slave is arrested and brought before the justice as a runaway, the justice is required, if he finds reasonable cause to suspect that the slave is a runaway, to give a certificate of that fact, describing the slave, the owner if known, &c., and by his precept indorsed thereon command the apprehender to deliver the slave to the jailer of the county, or if the owner is resident in the county of the justice, to deliver the slave to his owner. The appellee did not give the required certificate, nor indorse the precept as required, but issued his warrant to the jailer commanding him to imprison the slave.

This objection to the proceeding of the justice is not merely formal. The framers of the statute while giving the apprehender a reward intended to require a corresponding service. It is important that the

court shall decide whether it be the duty of the apprehender or the justice to inquire and ascertain whether the owner of the slave reside in the county. No inquiry seems to have been made by either.

The authority to act in this case being by statute, it should have been strictly pursued, which was not done. There was no authority to issue the warrant of commitment to the jailer.

Appellee's counsel admit liability if there was no jurisdiction, but insist that the slave was rightfully brought before the appellee, and that, if the issuing of the warrant to the jailer was an error, it was a judicial error in a matter within his jurisdiction, for which there is no responsibility.

The rule relied on by appellee is thus stated in *Starkie's Evidence*, vol. 2, 585, 6: "It seems to be a settled rule that a conviction still subsisting and valid on the face of it, on a subject within the jurisdiction of the defendant as a magistrate, is a legal bar to an action done under such conviction." But he adds: "It is otherwise when the subject matter is not within the jurisdiction of the magistrate, or where it appears from the conviction itself that he has been guilty, of an excess of jurisdiction." *Ib.* 586, 7. Numerous cases are cited in the text and notes in support of the latter proposition. We ask particular attention to the cases of *Crepps vs. Durden*, *Couper*, 646, and *Baldwin and wife vs. Blackman*, 1 *Burrow*, 595-602, decided by Lord Mansfield. In the last case the defendant, who was a magistrate, was authorized by statute to confine paupers in the house of correction "for one month," but issued his warrant for their confinement until they should be discharged, &c. It was held that this judgment was void, and that the magistrate was liable in trespass, because he had exceeded his jurisdiction by confining the plaintiff for an indefinite time.

The following rule is deducible from the cases: Where an act has been done by a judicial officer, which he was authorized to do upon a proper state

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of case, he is not personally liable for any error of judgment, either as to the facts in the case decided, or as to the law applicable to the facts, but where (although he has jurisdiction of the subject matter) he exceeds his jurisdiction, by doing an act which he is not authorized to do, upon any state of case, nor under any circumstances—it is *coram non judice* and void, and the judge is liable as any other person would be.

The case of *Jarret vs. Higbee*, 5 *Monroe*, 546, relied on, was decided under the act of 1798, (2 *Stat. Law*, 1411,) which differs materially from the Revised Statutes. Under the act of 1798 magistrates had authority to *imprison a suspected runaway*, and issue his mitimus to the jailer under certain circumstances; and that in that case no inquiry could be made in a collateral proceeding to ascertain whether the proper state of facts existed to authorize the issuing of the mitimus.

The doctrine that when a justice has once acquired jurisdiction he is not responsible for any error, however palpable, or any outrage however gross, is not admitted; if so, a judge having the power to fine or imprison, for contempt, might substitute whipping, and it would be a "judicial error," and no responsibility attach.

The error of the appellee is palpable. He had no authority to issue a warrant for the imprisonment of supposed runaways. All he could do was to issue a precept commanding the apprehender to lodge the slave in jail, or deliver him to the owner.

The point relied on was raised by the second instruction, which was overruled.

Clement & Taylor and *Ripley & Logan* for appellee—

The appellee denies that he knew that the slaves brought before him were the slaves of appellant, or that there was any sufficient evidence of that fact before him. He also denies any knowledge that the appellant was a citizen of Jefferson county. De-

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nies any malicious design to oppress the appellant under color of law. Alleges that the slaves were brought before him by a police officer, as runaways; that upon hearing the case it appeared to him that the slaves were runaways. That he did not know their owners, or that they resided in Jefferson county.

The 1st section, article 6, *Revised Statutes*, page 636, gives jurisdiction to justices of the peace to dispose of any runaway slave which may be arrested and brought before them. If there be reasonable cause to suspect that such slave is a runaway, the justice is required to give a certificate of the fact, stating the county in which the slave was arrested; the name, if known, and description of the negro; the name and residence, if known, of the master; the name and residence of the person who apprehended the runaway; the amount due the apprehender; and by his precept indorsed thereon command him to deliver the slave to the jailer of the county, or if the owner resides in the county of the justice, to deliver him to the owner. That the commitment was by warrant, instead of a bare precept on the back of the certificate, cannot be material. It was a substantial compliance with the statute. The case of *Jarret vs. Higbee*, 5 *Monroe*, 555, is analogous, and is relied on.

The appellee, as justice of the peace, having jurisdiction of the case, and having judicially disposed of it, is in no way responsible when he acted in good faith, without any malicious purpose towards the appellant, of which there is no proof.

The judgment should be affirmed.

Judge SIMPSON delivered the opinion of the Court.

September 27.

In this action, brought by the owner of three slaves against the defendant, who is a justice of the peace, the plaintiff alleged that the defendant had, under color of his office, but, in reality, for the purpose of vexation and oppression, committed said slaves as runaways to the jail of Jefferson county, where they were confined for the space of twenty-four hours,

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when in fact said slaves had not run away, and he, the plaintiff, resided in Jefferson county, which was known to the defendant.

The defendant denied in his answer that he had, at the time the slaves were brought before him as runaways, any evidence that they belonged to the plaintiff, or any knowledge of the plaintiff's place of residence. He alleged that said slaves were brought before him as runaways, by a police officer in and for the city of Louisville; and upon hearing the proof in the cause, it appeared to his satisfaction that they were runaways, and therefore he committed them, as it was his duty to do, to the jail of Jefferson county. He alleged that in this matter he acted in his official capacity, was in the performance of his duty, and was not actuated in what he did by any malicious motive or feeling, or by any desire to harass or oppress the plaintiff.

The jury having rendered a verdict for the defendant the plaintiff has appealed to this court.

1. When a slave is brought before a justice of the peace as a runaway slave it is the duty of the justice to determine whether or not he be a runaway, and whether the person apprehending the slave shall deliver him to the owner or to the jailer of the county. (*Revised Statutes*, 636, in connection with the act of 1798, *Stat. Laws*, 1411.)

By the Revised Statutes, page 636, it is enacted that "every slave arrested as a runaway shall be taken before a justice of the peace, and if there be reasonable cause to suspect that such slave is a runaway, the justice shall give a certificate of the fact, stating therein the county in which the slave was arrested, the name, if known, and description of the negro, the name and residence of his master, and the name and residence of the person who apprehended the runaway, and the amount due the apprehender, and by his precept endorsed thereon, command him to deliver the slave to the jailer of his county, or if the owner is resident in the county of the justice to deliver the slave to the owner thereof."

The defendant instead of making out a certificate, and indorsing a precept thereon as required by the statute, issued a mittimus to the jailer, commanding him to receive the slaves into his custody and keep

them safely until they should be demanded by their owner, or discharged by due course of law.

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It is contended that in so doing, he exceeded his authority as a justice of the peace, and has rendered himself liable to the plaintiff in this action. To sustain this position, the foregoing statute is relied upon as requiring the justice before whom a slave is taken, if he have reasonable cause to believe that he is a runaway, to command, by his precept endorsed on the certificate, the apprehender either to deliver the slave to the jailer of his county, or to the owner, if he resides in the county; and that the justice has no power to determine whether the slave shall be committed to jail, or delivered to the owner; but that matter must be left by him to the person who has apprehended the slave.

In this construction of the statute we do not concur. It is the duty of the justice to determine whether or not the slave is a runaway, and also whether the apprehender shall deliver him to the owner, or to the jailer of the county. This, we think, is the true meaning of the statute, and this construction is fortified by a reference to the statute of 1798, (2 *Statute Law*, page 1411,) which continued in force until the adoption of the Revised Statutes. By that statute it was provided, that if the owner should not be identified to the satisfaction of the justice, he should, by his warrant, commit the runaway to the jail of his county. We cannot perceive any intention on the part of the Legislature to change the law upon this subject, and transfer the decision of this question from the justice of the peace acting in his official capacity, to the person who may apprehend the runaway, and who may be wholly irresponsible.

The warrant issued in this case by the justice was a substantial, although not a formal and literal compliance with the requisitions of the statute. It contained a statement, although imperfect, of the facts which are required by the statute to be embraced in

2. The warrant issued by the justice, in such case, may not conform literally to the requisitions

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of the statute,
if the omission
be not prejudi-
cial or material
to the owner of
the slave, he
cannot com-
plain.

the certificate to be made out by the justice. Its omissions are not prejudicial to the plaintiff, and the statement it contains, that the slaves said they belonged to him, and that he resided in Jefferson county, did not prove that such was the fact, as the statement of the slaves was not competent evidence on the subject, and would not have justified any action by the justice based exclusively thereon. It was not proved that the defendant, at the time the slaves were brought before him as runaways, knew them or their owner, or their place of residence, or that he had any knowledge on the subject, except that which he derived from the information of the slaves themselves. There was no testimony tending to prove that he had any reason to believe that they had not run away from their owner; and as they were absent from home without any written permission from their owner—at least none was proved to have been in their possession—and they had been apprehended and brought before him, charged with being runaways, he had an undoubted right to consider and treat them as such.

As the owner had not been identified to his satisfaction, he had a right to order them into the custody of the jailer, and whether this was done by him in the exact manner prescribed by the statute, by a precept requiring the apprehender to deliver them to the jailer, or by his warrant directed to the jailer himself is not material, as the same effect precisely resulted from the adoption of either mode of accomplishing this object.

And we do not admit that if the justice while acting within the limits of his jurisdiction, had committed a mere error of judgment, without any malicious or improper design, that he would have thereby subjected himself to any liability whatever.

3. A justice is not bound to regard the statements of a slave apprehended as a runaway as evidence. Nor is it admitted that a justice is responsible for an error of judgment in commit-

Testimony of any information in relation to the slaves that had been given to the persons apprehending them, when the defendant was not present, and

of which it did not appear he had any knowledge, was clearly inadmissible against him.

The law of the case as expounded by the court below in its instruction to the jury, is in unison with the principles of this opinion.

Wherefore, the judgment is affirmed.

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ting a slave as a runaway where there is no malicious or improper design.

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Case 15.

APPEAL FROM JEFFERSON CIRCUIT.

PET. EQ.

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B. became the surety of H. in a note drawn, payable to a bank, with the express view of obtaining a loan of money for the support of the family of H. H. without the assent of B. passed it off to R. in discharge of a pre-existing debt: held—that B. was not responsible to R. upon the note.

The facts of the case are fully stated in the opinion of the court.—*Rep.*

J. Harlan, for appellant—

This case is not distinguishable from the case of the *Northern Bank vs. Ward*, 14 B. Monroe, 351, and *Harris vs. Turner*, MSS. opinion present term.

Russell was ignorant of the circumstances which induced Ballard to sign the note as the surety of Hamilton. He had loaned money to Hamilton, and the note sued on was received by Russell in the regular course of business. Ballard's responsibility was not increased in consequence of the note coming into the hands of Russell, and no reason is perceived why Ballard should not be held responsible. Regarding the question arising in this case as already decided by the cases referred to, the case is submitted.

Logan and Bland Ballard, for appellee—

Argued, that the precise question involved in this case had not been decided in any reported case by

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this court. In the case of *Conway, &c., vs. Bank United States*, 6 J. J. Marshall, 129, it was held that if a note be executed by A. as principal, and B. and C. as his sureties payable to a bank, with the view of enabling A. to have the note discounted by the bank, and A. failing to have the note discounted sells it to D.—that the sureties are not liable, and that their defense is available under the plea of no consideration.

In the case of *Gore vs. Ross and Pettit*, 2 B. Monroe, 299, the case of *Conway vs. Bank of U. S.*, was referred to and approved; and it was further decided that if one sign a note as surety, blank as to payee, but for the avowed purpose of enabling his principal to borrow money from A., and without the knowledge or consent of the surety, filled up and made payable to B., who had knowledge of the purpose for which the note was signed by the surety. A plea of *non est factum* would be an available defense for the surety.

The cases of *Smith vs. Mobberly*, 10 B. Monroe, 266, and *Ward vs. Northern Bank*, 14 B. Monroe, 351, are not analogous to the present case. In the latter case the note was executed to raise money, and money was raised upon it, though not advanced by the bank. In the case under consideration, though the note was executed for the same purpose of raising money, it was not so applied, but in discharge of a pre-existing debt of the principal; the consideration therefore failed.

That the note was payable to the bank, was notice of the purpose of its execution. Russell was bound to know that it had been given to the bank for property, or was intended for discount to obtain money, and that in taking it for an old debt he was defeating the purposes of its execution, as was the case in the case of Ross against Gore and Pettit, *supra*.

October 1.

Judge SIMPSON delivered the opinion of the Court.

The appellant brought an action on a note executed by the defendants, which reads as follows, viz:

“\$155

LOUISVILLE, KY., May 12th, 1853.

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“One hundred and sixteen days after date, we,
“ James D. Hamilton, as principal, and A. J. Ballard,
“ as sureties, promise to pay jointly and severally
“ to the order of the Mechanics' Bank, one hundred
“ and fifty-five dollars, negotiable and payable at
“ said bank in Louisville, without defalcation, for
“ value received. Witness our hands.

JAMES D. HAMILTON,
A. J. BALLARD.

He alleged in his petition that said note was made solely for the purpose of raising money to pay a debt which he held on the defendant, Hamilton, and that the latter being unable to have it discounted in bank, transferred and delivered it to him in liquidation, and discharge of the debt he owed him.

The defendant, Ballard, denied in his answer that said note was made for the purpose alleged by the plaintiff, and stated expressly that he would not have signed it if he had known it would have been so applied. He also alleged that he executed it as the surety of his co-defendant, for the sole purpose of raising money for the use of the family of the latter, by borrowing it from the bank; that he would not have executed it for any other purpose, and that his co-defendant had no authority from him to use the note in any other manner whatever. The bank, he alleged, had never discounted or owned the note, but it had been passed by his co-defendant directly to the plaintiff, in payment of a pre-existing debt, in open violation of the understanding between him and his co-defendant at the time it was executed, and in utter subversion of the object for which it was created.

A demurrer to this answer was overruled, and the allegations therein being sustained by the testimony, the court, to whom the law and facts of the case were submitted by the parties, rendered a judgment in favor of the defendant Ballard, and gave the plaintiff a judgment against the other defendant.

It is contended on the part of the appellant, that

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according to the case of *Ward &c., vs. Northern Bank of Kentucky*, 14 B. Monroe, 351, and the principles therein settled, the defense of Ballard was insufficient, and the judgment exonerating him from liability on the note is erroneous.

On the other side, the case referred to has been assailed as containing unsound doctrine, and it is also contended, that conceding it to be authoritative, it is not analogous to the present case.

The doctrine contained in that case is, that when a note is made to raise money upon it, and it is executed by certain persons as sureties to impart credit to it, and left by them in the possession of their principal, who uses it for the very purpose for which it was made, the sureties cannot escape responsibility on it, upon the ground that it was made payable to a bank, and the money was advanced on it, not by the bank, but by another person. The decision in that case was made to turn upon the fact that the object for which the paper was executed, to-wit, to raise money upon it, had been accomplished, and the circumstance of it having been made payable to the bank, was deemed insufficient to exonerate the sureties.

There is a clear and marked distinction between that case and this. Here the intention with which the paper was created, instead of being carried into effect, was in reality defeated. The very fact upon which that case turned is wanting in this. No money was raised upon this note, but it was passed off in payment of a pre-existing debt. In that case the act of the surety had enabled the principal to obtain the money from a third person, and the question, who should sustain the loss, was, at least, in a moral point of view, clearly against them. But here the plaintiff has not been induced by the act of the surety to part with his money or his property. He does not sustain any loss by the discharge of the surety from liability on the note, but he is thereby only placed in his original position, and the principal in

the note still remains his debtor, and liable for the amount of the debt.

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The form of the note in this case indicated the purpose for which it was executed. It was made payable to a bank, and showed on its face that Ballard was only the surety of his co-obligor.

These circumstances were sufficient notice to the plaintiff, that the paper was intended to be used to raise money upon it. They were sufficient, at least, to have put him upon an inquiry as to the object of the surety in its execution. By such an inquiry he could have ascertained that the intention of the makers of the note was truly indicated on its face. Any supposition or inference that Ballard intended, by executing the note, to become a surety for the payment of his debt, instead of being authorized, was in fact repelled by the form of the writing.

If a note be purchased by a party, with notice that one of the obligors is a surety merely, and that the sale and purchase will defeat the purpose for which it was executed by him, or will violate any understanding or agreement between him and his principal, then the purchaser will be affected by such notice, and cannot hold the surety liable on the note, or compel him to pay it.

The plaintiff must be considered as having notice at the time the note was transferred and delivered to him by Hamilton; that it was signed by his surety, that money might be raised upon it by his principal, and that by its transfer to him it was diverted from the purpose for which it was made, and the understanding of the parties to it was thereby set at naught and wholly disregarded. Consequently, he cannot hold the surety responsible upon the writing.

Wherefore, the judgment is affirmed.

B. became the surety of H. in a note drawn payable to a bank, with the express view of obtaining a loan of money for the support of the family of H. H., without the assent of B., passed it off to R. in discharge of a pre-existing debt: held that B. was not responsible to R. upon the note.

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vs.
COM' TH.

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Case 16.

Clark vs. Commonwealth.

ORD. PET.

APPEAL FROM ROCKCASTLE CIRCUIT.

1. "Where a person or thing necessary to be mentioned in an indictment, is described with circumstances of greater particularity than is requisite, yet those circumstances must be proved; otherwise it would not appear that the person or thing is the same described in the indictment." (*Wharton's Am. Crim. Ev.*, 3d Ed. page 101; *Dorsett's case*, 5 *Roger's Rec.* 77; 6 *Maine*, 476; *United States vs. Porter*, 3 *Day's cases*, 283.)
2. The indictment was for having counterfeit bills in possession, of a certain description, purporting to be on certain named banks, with the intent to pass them. The proof failed to show that the notes which defendant had, purported to be on any of the banks specified; such proof was necessary to authorize a conviction, and the court should so have instructed the jury when requested.
3. It is not necessary that the intention should be to pass counterfeit bills in the state of Kentucky. The statute is general, embracing the intention to pass them at any place.

The facts of the case are stated in the opinion of the Court. *Rep.*

B. & J. Monroe for appellant—

The indictment is for having counterfeit bank notes in possession, purporting to be on various banks of Kentucky, with the intention to pass them. None of the witnesses proved that any money found in possession of defendant was counterfeit, except by the confessions of defendant; and the proof is that the notes seen purported to be Virginia bank notes.—Whether there be any incorporated banks in Virginia this court does not judicially know.

1. The indictment specially charges that defendant had in possession counterfeit notes, purporting to be the issue of the Farmers Bank of Kentucky, the Northern Bank of Kentucky, and the Southern Bank of Kentucky, of certain descriptions. Can the defendant be convicted by proof showing that he was in possession of notes of different descriptions, and purporting to be the issue of different banks from

those specified in the indictment? It is supposed he cannot.

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vs.
COM'TH.

Waving the question whether it was necessary to say more in the indictment than that the defendant had in his possession forged and counterfeit bank notes, with the intention of passing them, it is insisted, that having described the notes particularly that the Commonwealth is confined to proof of such notes as are described. Proof that the defendant had other counterfeit notes in possession might have been admissible after proving the possession of the notes described, to prove the intention to pass such notes, but not to establish the main charge in regard to the notes described.

In England, under the statute of William IV prohibiting the circulation of false coin, it was held that the prosecution was bound to show—1. The possession of the false coin. 2. The knowledge that it was false coin. 3. The intent to utter or pass off the same. (See *Roscoe's Criminal Evidence*, 396.) In this case it was necessary to prove the particular description of bank notes specified in the indictment, and then that they were counterfeit. In the authority just cited, at page 102, it is said, "when a person or thing necessary to be mentioned in an indictment is described with greater particularity than is requisite, yet those circumstances must be proved, otherwise it would not appear that the person or thing is the same described in the indictment." On the same page, same author, this case is given: "If a man is charged with stealing *a black horse*, the allegation of color, though unnecessary, being descriptive of that which is material could not be rejected." (3 *Starkie's Ev.* 1531, 1st ed.) Other cases are cited. (*Roscoe's Ev.*, 102, note 1.) One of which cases is the case of an indictment for coining, alleging possession of a die made of *iron and steel*, where the proof was that it was made of *zinc and antimony*.

It was held in the case of the *United States vs. Porter*, 3 *Day's cases*, 283, that an allegation in an indict-

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ment which is not impertinent or foreign to the case must be proved, though a prosecution for the offense might be supported without such allegation.

2. The circuit judge erred in refusing to instruct the jury that the proof should show the notes alleged to have been in defendant's possession were of the description specified in the indictment to authorize a conviction.

3. The court erred also in refusing to instruct the jury that they should believe from the evidence that the defendant intended to pass the counterfeit money in Kentucky. It is not an offense against the statute to have an intention in Kentucky to pass counterfeit bank notes in another state.

A. A. Burton, on the same side—

The conviction in this case ought to be reversed for these reasons:

1. The indictment charges that the forged bank notes purported to be on Kentucky banks. There was no proof offered of any such notes, but of notes that purported to be on a bank in another state. This variation was fatal. (*Archibald's Crim. Pl.* 438-42; 1 *Chitty's Criminal Law*, 233-4; 3 *Ib.*, 1041; 2 *East. Pl. Crown*, 882; 2 *Starkie Ev.* 467-8; 1 *Greenleaf Ev.*, section 65; 3 *Ib.*, sec. 108; *United States vs. Cantril*, 4 *Cranch*, 167.)

Section 135 of the Criminal Code of Kentucky clearly contemplates a true description of the bank note in all cases, unless it is withheld or destroyed by the accused, by providing that a misdescription shall not be fatal when it is so withheld or destroyed.

The Code does not dispense with charges of substance in an indictment that were material before its adoption. Section 128 nor no other provision contemplates any such change. On the contrary, it affirms in effect the law and practice as it existed at the time of its adoption. (*Sections* 121-3.)

The indictment is worse than if it had only contained a charge in general terms of having forged or

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counterfeit bank notes, with intent, &c., without naming the bank or describing the notes, which is palpably bad; because charging one kind or description of notes tends to mislead and deceive the accused. He was notified by the indictment to answer one charge, and is proceeded against for another. When he was notified to defend himself against a charge of having forged Kentucky bank notes, he was not likely to prepare himself against a charge of having forged Virginia bank notes.

2. There was no proof offered of the existence of any such bank as that upon which the notes purported to be. Its charter should have been produced, it being an institution of another state, and foreign to Kentucky. There could have been no valid conviction unless the bank had been a lawfully incorporated bank of this or some one of the United States. (*Rev. Stat.*, 255.)

3. A new trial should have been granted for the misbehavior of the jury. No prisoner is safe in the hands of such a jury. (*Criminal Code*, section 242.)

A new trial ought to have been granted for the deception practiced on the accused by the witnesses for the prosecution.

A reversal is asked.

J. Harlan, for appellee—

Section 129 of Code of Practice provides that “no indictment is insufficient, nor can the trial, judgment, or other proceeding thereon be affected by any defect which does not tend to the *prejudice* of the *substantial rights* of the *defendant on the merits*.”

The evidence for the prosecution was in substance as follows: The first witness proved that defendant pulled from his pocket a large roll of bank bills, and handed one of the bills to the witness, who examined it as well as he could, it being in the night time, and “thought it a bill on some of the banks of Virginia, and took it to be counterfeit.” Defendant told witness he might have as much of that kind of paper

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Carr's ex.

as he wanted, that it was counterfeit, and that witness could pay defendant one dollar of good money for every dollar of it that witness passed. A letter from the defendant to an uncle living in Arkansas, inclosed a bank bill, in which the writer says: "I want you to take this bill and see if you can pass it, and I want you to write to me whether you know anything of the like or not. If you think the chance would be good I would come to see you next fall and fetch a quantity of different kinds. I know a few things, and keep this to yourself."

The second witness said, "that defendant offered to let him have counterfeit bank notes, two dollars for one of good money, and he saw a stamp at defendant's house that defendant showed to him, and told him it was a tool to make counterfeit half dollars with. He, (defendant,) showed *one* counterfeit bank bills, defendant said, one of which I thought was a ten dollar Kentucky bill, and said he had made it profitable."

Another witness proved that defendant exhibited to him a large roll of bank bills, which defendant said were counterfeit, and proposed to let witness and another man who was with him have some of it, and proposed to them to come another day for that purpose, but witness did not go.

The fourth witness said, "he never saw defendant have any counterfeit bills, but defendant proposed to him to go into the business, and told witness that he had bought some cows with counterfeit money, and had about eleven hundred dollars of bank bills or notes."

The defendant proved by several witnesses general good character prior to the commencement of the prosecution. The commonwealth then proved that defendant had been suspected for two years previously of being concerned in the passing of counterfeit money.

1. I contend that the evidence authorized the jury to find the defendant guilty. The charge is for hav-

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ing in his possession counterfeit bills representing the genuine bills of certain banks in Kentucky. One witness said that defendant had shown him some counterfeit bank bills, "one of which he thought was a ten dollar Kentucky bill." This, with the other evidence in the case, authorized the jury to find the defendant guilty. The possession of a single counterfeit bill, with the intention of passing it as genuine, constitutes the offense. (*Revised Statutes*, 255.)

The statute does not require any evidence that the banks were duly chartered. If the notes purport to be on banks that never had any existence, the punishment is the same as if the banks were duly chartered. (*Rev. Stat.* 256, sec. 3.)

2. The alleged misconduct of the jury, according to the modern authorities, is not sufficient to set aside the verdict, unless evidence had been introduced conducing to prove that some improper influence had been exercised. No such evidence was offered.

As the evidence establishes, beyond doubt, the guilt of the defendant, and as there is no defect which tends "to the prejudice of the substantial rights of the defendant on the merits," the judgment should be affirmed.

Judge STILES delivered the opinion of the Court.

October 4

James Clark was indicted under the Revised Statutes—Sec. 2, Art. 10, Chap. 28, title *Crimes and Punishments*—"for having unlawfully in his possession, on the 1st day of December, 1852, twenty counterfeit bank notes of the *Farmers Bank of Kentucky*, each of the denomination of twenty dollars; ten counterfeit bank notes on the *Farmers Bank of Kentucky*, of the denomination of ten dollars; twenty one dollar bills on the *Northern Bank of Kentucky*; twenty two dollar bills on the *Farmers Bank of Kentucky*; twenty one dollar bills on the *Farmers Bank of Kentucky*; twenty twenty dollar bills on the *Southern Bank of Kentucky*; twenty ten dollar bills on the *Southern Bank of Kentucky*; all of which

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'was payable at the different offices of discount and deposit of said banks in this State, and which said counterfeit notes, whilst thus in his possession, were known to him to be counterfeit, and were held by him with intent to defraud, by selling and passing the same.'

Upon trial in the Circuit Court he was convicted, and sentenced to imprisonment in the penitentiary for two years, and from that judgment has appealed to this court.

The main ground relied on for reversal is alleged error of the Circuit Court in granting and refusing instructions to the jury.

The evidence conducted to show very clearly that the accused, about the time alleged, had in his possession counterfeit bank bills, with an intent to pass the same; but no witness could state that the bills thus in his possession purported to be bills upon either of the banks mentioned in the indictment. One witness proved that the bills he saw were, as he thought, "on some of the banks of Virginia." And another stated that the accused exhibited to him some counterfeit bank bills, 'one of which he thought was a ten dollar Kentucky bill.' There was other testimony showing that he had a number of counterfeit bank bills in his possession, with an intent to pass them fraudulently, but none as to the description of the bills.

Upon this evidence, among other instructions asked by counsel for the accused was the following: "That unless the jury should believe from the evidence, to the exclusion of a reasonable doubt, that the defendant, before the finding of the indictment, had in his possession counterfeit bank bills, or a counterfeit bank bill, of the *description and denomination* mentioned in the indictment, with the intention of passing the same, they should acquit the prisoner." This instruction was refused by the court, and an exception taken to the refusal by the defendant.

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The doctrine seems to have been well settled in England and this country, that in criminal cases, although words merely formal in their character may be treated as surplusage, and rejected as such, a descriptive averment in an indictment must be proved as laid, "and no allegation, whether it be necessary or unnecessary, more or less particular, which is descriptive of the identity of what is legally essential to the charge in the indictment can be rejected as surplusage."

So where a person or thing necessary to be mentioned in an indictment is described with circumstances of greater particularity than is requisite, yet those circumstances must be proved, otherwise it would not appear that the person or thing is the same described in the indictment. (*Wharton's Am. Crim. Law*, 3d edition, 291; *Roscoe's Criminal Evidence*, 101.)

Thus, on an indictment for coining, there was an alleged possession of a die made of iron and steel, when, in fact, it was made of zinc and antimony. The variance was deemed fatal. (*Dorsett's case*, 5 *Roger's Rec.* 77.) On an indictment for stealing a pine log, marked with a particular mark, it was held that the mark must be proved as alleged, and the description could not be rejected as surplusage. (6th *Maine*, 476.) And in the case of the *United States vs. Porter*, 3 *Day's cases*, 283, the court held, that an allegation in an indictment, not impertinent or foreign to the cause, must be proved, though a prosecution for the offense might be supported without such allegation.

Here the description of the bills, as set forth in the indictment, if not essentially necessary to the prosecution under the statute referred to, is neither impertinent or foreign. And having been alleged, however, it devolved upon the commonwealth to prove, as alleged, that the defendant had a bill or bills of the description and denomination stated, with intent to pass the same.

1. "Where a person or thing necessary to be mentioned in an indictment is described with circumstances of greater particularity than is requisite, yet those circumstances must be proved, otherwise it would not appear that the person or thing is the same described in the indictment." (See *Wharton's Am. Crim. Ev.*, 3d edition, p. 101; *Dorsett's Case*, 5 *Roger's Rec.* 77; 6 *Maine*, 476; *United States vs. Porter*, 3 *Day's Cases*, 283.)

2. The indictment was for having counterfeit bills in possession, of a certain description, purporting to be on certain named banks, with the intent to pass them;

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the proof failed to show that the notes which defendant had purported to be on any of the banks specified—such proof was necessary to authorize a conviction, and the court should have so instructed the jury when requested.

3. It is not necessary that the intention should be to pass counterfeit bills in the State of Kentucky—the statute is general, embracing the intention to pass them at any place.

In refusing to submit that question to the jury, as asked for in the instruction referred to, the Circuit Court, in our opinion, erred to the prejudice of the accused.

In reference to the instruction requiring the jury to find that the accused intended to pass the bills in this state, such intent is not demanded by the statute, and that instruction was properly refused. The offense created by the statute, is having counterfeit bank bills in possession, with an intent to pass them, without reference to the place where such passing shall occur.

The action of the Circuit Court upon the ground for a new trial, for alleged misconduct of the jury, is not embraced among the errors that are subject to revision by this court, and need not be noticed.

For the reasons assigned, the judgment is reversed, and cause remanded for a new trial in conformity with this opinion.

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Delphia Jackson, (of color,) vs. Collins.

FRT. Eo.

APPEAL FROM CLARK CIRCUIT.

1. The 10th article of the present constitution of Kentucky, which took effect in June, 1850, so far as it prescribed that laws should be passed to prevent the emancipation of slaves to remain in the state, was not effectual of itself to prevent owners from emancipating their slaves, until the Legislature passed laws to that effect, and a deed of emancipation executed after the constitution went into effect, before the passage of such act by the Legislature, was valid, under the provisions of the act of 1798.
2. The right to emancipate slaves not being taken away by the present constitution, until legislation under it, the right remained unaffected until legislation took place, and the right of the person emancipated to remain in the state was not affected, as the previous laws on that subject were not repealed by the constitution, but expressly continued in force.

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3. The present constitution of Kentucky, which went into operation in June, 1850, did not by its own force operate to prevent the unconditional emancipation of slaves, nor repeal any existing law giving that right.
4. The bastard child of a free person of color is heir to the mother.
5. A devise was made to slaves who could not take, and a devise over to others in case the first devisees die without issue. Held, that the first devisees, being incapable of taking, being slaves, that the devise over was void, and that the heir at law must take.
6. In case there be an executory devise to take effect upon the death of a particular person without issue, the ulterior devise having no connection with or dependence upon the previous interest, but depending upon a contingency which may or may not terminate a previous interest created by the will: Held, that the executory devise could not take effect until the contingency occur, though the first interest could not take effect, because of the incapacity of the devisee to take, and that the heir-at-law should take.

J. B. Huston, for appellant—

Delphia, a free woman of color, brought this suit as heir-at-law to Jemima, her mother, also a free woman of color. Jemima made a will, dated in 1839, which was admitted to record, by which she devised the property in controversy to be sold and the proceeds divided between her two daughters, Delphia and Caty; but if either of her daughters should die without children, her proportion should go to the survivor, and on the death of the daughters, the children of each to have their mother's portion. If the daughters and their children should die without issue, then she directs that the whole be divided between the children of Mary P. Collins, wife of Willis Collins. By a codicil dated in 1851, the testatrix recites her purchase of Delphia, and gives to her two grand-sons, Billy and Ellick, sons of her son Robin, instead of her daughter Delphia, one-half of the property mentioned in the will, and of any other property she may possess at her death, except her daughter Delphia, who is to be free. Delphia was emancipated by her mother, by deed, 28th October, 1850.

1. All the beneficiaries in the will of Jemima being slaves at her death, except the children of Mrs. Collins, the question arises can they take, or does the

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property descend to Delphia, her heir-at-law and only child or grand-child who is not a slave?

At the date of the deed by which Delphia was emancipated, no statute had been passed by the Legislature under the 10th article of the constitution of Kentucky, which took effect in June, 1850, and the law of 1798, giving a right to emancipate slaves, was in full force, and the deed of emancipation of Delphia was effectual to confer freedom, and subsequent legislation could not have a retrospective effect, and defeat that right.

2. The beneficiaries in the will who are to take under the devise upon the happening of the contingency specified in the will, are all slaves, and cannot take under the will, and the children of Mrs. Collins can never take until the happening of the contingency specified, which may not happen, and the devise is ineffectual to deprive Delphia of her right as heir-at-law.

A reversal is prayed.

Samuel Hanson, for appellee—

The first question is, had Delphia any claim under the will?

2. If so, was she free under the present constitution of Kentucky and Revised Statutes, and capable of taking? The Circuit Court decided the latter question against the appellant. Both questions are open in this court, and it is desired that both be decided.

The petition and opinion of the Circuit Court fully explain the questions in controversy.

October 5.

Chief Justice MARSHALL delivered the opinion of the Court.

This petition was filed by a woman of color, by name Delphia Jackson, suing as a free person, asserting rights as sole heir of her mother, Jemima Clark, a free woman of color, by whom the plaintiff had been purchased, and was emancipated by deed, dated in October, 1850, as well as by the codicil of

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her will, made in September, 1851. The will itself, dated in 1839, was proved and admitted to record in 1854. The will which is referred to, and is a part of the record, appoints Willis Collins executor, and Mary P. Collins, his wife, executrix, and directs them to sell certain described property, being an undivided half of a house in Winchester, and to hold the proceeds in trust for the two daughters of the testatrix, by name Caty and Delphia, and to dispose of any other property of which she should die possessed in the same way, provided that if either of the daughters should die without children, her portion should go to the survivor; and, on the death of the daughters, the children of each to have their mother's portion. If the daughters and their children should die without issue, then, and in that case, the testatrix wills and bequeathes whatever she may possess to the children of Mrs. Mary P. Collins, her executrix, to be equally divided between them. By a codicil, dated in September, 1851, the testatrix recites her purchase of Delphia, and gives to two grand-sons, Billy and Ellick, sons of her son Robin, instead of to her daughter Delphia, one-half of the property mentioned in the will, and of any other property she may possess at her death, except her daughter Delphia, who is to be then free; and directs that the property given to her two grand-sons be held in trust, &c., as in the will.

The petition states that all the devisees named in the will, except the children of Mrs. Collins, are slaves, and that the contingency on which the devise to these children is to take effect cannot reasonably occur, as the plaintiff herself has children, and as she leaves grand-children; that Mrs. Collins is dead, leaving but two children who are defendants; that the plaintiff is in possession of the house mentioned in the will, which, together with all her other property, she claims as the sole heir of her mother; that she desires to retain the house as a home, and does not wish it to be sold, but that Collins, the executor,

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is now proceeding to sell it, and has advertised a sale, &c.; and she asks for an injunction against the sale.

A demurrer to the petition was sustained, and the petition dismissed on the ground, as appears from the decree, that as the 10th article of the present constitution, among other things, requires the Legislature to pass laws to permit slaves to be emancipated by the owners, "and to prevent them from remaining in this state after they are emancipated," took effect as a part of the constitution in June, 1850, before the date of the deed of emancipation by which the plaintiff claims her freedom, that deed and the emancipation declared by it is subject to the operation of the legislative act, passed after its execution, which is referred to as contained in the *Revised Statute*, page 643, 4, which makes removal from the state a condition of emancipation, and declares that until such removal, the absolute right to freedom shall not vest.

1. The 10th article of the present constitution of Kentucky, which took effect in June, 1850, so far as it prescribed that laws should be passed to prevent the emancipation of slaves to remain in the state, was not effectual of itself to prevent owners from emancipating their slaves, until the legislature passed laws to that effect; and a deed of emancipation executed after the constitution went into effect, before the passage of such act

The law existing before the adoption of the present constitution, authorized emancipation without any such condition; and, if that authority, as given by the previous law, (the act of 1798,) was not wholly abrogated, the deed of emancipation, made in pursuance of the prior law, and before the passage of any statute intended to carry the constitutional mandate into effect, and before, in fact, there was any opportunity for the passage of such a law, must, in our opinion, be effectual, except so far as the constitution itself either made it ineffectual, or subjected it to future legislation, by which its efficacy has been impaired. But it is admitted, and is entirely clear, that the constitutional provision referred to does not itself impose any condition upon emancipation. It does not by its own force and operation attach upon individuals—either the emancipated or the emancipators. It is a mandate to the Legislature, and dependent upon the action of that body to give it effect. It does not declare that all future acts of emancipation shall

have no effect until removal, nor even require the Legislature so to enact. It requires the passage of a law or laws to prevent emancipated slaves from remaining in the state after their emancipation.— And the subsequent enactment, declaring that the act of emancipation shall not confer absolute freedom on the slave, until he or she is removed from the state, though, as a means of preventing their remaining in the state, it is allowed by the constitution, is certainly not expressly commanded by it. And in fact a previous statute had been enacted for the purpose of carrying out this provision by compelling emancipated slaves to leave the state and not return to it, under pain of being convicted and punished as felons, but without declaring the act of emancipation void, or suspending its effect.

The constitution does not itself establish a principle which shall be operative from its own date, but at most establishes a principle for future legislative action, and to be effectuated by future laws; and that principle is not that future emancipation shall depend upon removal, but that slaves to be afterwards emancipated under the required legislation should in some mode be prevented from remaining in the state.

By the terms of the constitutional provision, legislation was necessary as well for permitting emancipation, as for preventing the slaves who might be emancipated from remaining in the state. Had there been no previous and continued statute giving authority to emancipate, there could have been no legal emancipation under this constitution, until the legislature should act upon the subject; and as the previous law imposed no condition as to removing from the state, and the constitution itself imposed none, it follows either that there was no right to emancipate between the adoption of the constitution and the subsequent legislation on the subject, or that the right existed as under the former law, and without condition as to removal. If the right thus remained, it

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by the legislature, was valid under the provisions of the act of 1798.

2. The right to emancipate slaves not being taken away by the present constitution until legislation under it, the right remained unaffected until legislation took place; and the right of the person emancipated to remain in the state was not affected, as the previous laws on that subject were not repealed by the constitution but expressly continued in force.

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seems to us that any act of emancipation done in virtue of it, after the adoption of the constitution, but before any legislation under it remained unaffected by such subsequent legislation, just as if the emancipation had taken place before the adoption of the constitution. For it would in fact have taken place before this provision became effectual by subsequent legislation. The subsequent legislation does not profess to be retrospective. The constitution does not require it to be so. Upon ordinary and just principles of construction it should be understood as being prospective only. And there is, in our view, no more reason, independently of the prohibition of *ex post facto* laws, for making the condition of removal prescribed by the Revised Statutes apply to an emancipation, evidenced by deed made before the date of that statute, than there is for making the punishments prescribed by the intermediate statute apply to the person emancipated before its enactment.

3. The present constitution of Ky., which went into operation in June, 1850, did not, by its own force, operate to prevent the unconditional emancipation of slaves, nor repeal any existing law giving that right.

It has not, so far as we know, been suggested that there was no existing right of emancipation after the adoption of the present constitution, until it was permitted by subsequent statute. If there was such right, it was because the constitution did not *ipso facto* repeal the previous law which gave and regulated it. And we are of opinion, that although the constitution prescribed future legislation which would be inconsistent with the unconditional right of emancipation, it neither abrogated the right, nor repealed the law which gave it, though it required the right and the law to be modified by the Legislature. The 1st sec. of the schedule, a part of, and appended to the constitution, and of equal authority with any other portion of it, expressly continues in force all laws of the state not inconsistent with the constitution. And although the law to be enacted under the mandate of this constitution would be inconsistent with the former law, yet as the former law, so far as it permits emancipation, is clearly consistent

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with the constitution, and as that instrument itself makes no change in the form of the effect of emancipation, or the right acquired thereby, we are of opinion that the former law is not repealed by repugnance to the constitution, and that not being inconsistent with it, the schedule expressly applies to and saves it. Whence it follows, that in our opinion the plaintiff is free, and has a right to sue.

The question, however, still remains whether her petition shows any cause of action or ground of suit; and this question is no more free from difficulty than that which has been just decided with respect to her right of freedom. As she was free at her mother's death, and then capable of being an heir, and as, although regarded in law as a bastard, she might inherit from her mother, we are of opinion that notwithstanding the former state of slavery of herself and her mother, she is entitled as sole heir and distributee to such estate owned by her mother at the time of her death as is not disposed of by valid devise or bequest.

At the date of the will all the devisees and beneficiaries therein, except the children of Mrs. Collins, were slaves, and with the exception of the plaintiff—afterwards emancipated—they are still slaves. The two grand-sons of the testatrix, substituted by the codicil to the place of the plaintiff, and to the benefit originally intended for her, were at its date and still are slaves. The plaintiff being, by the effect of the deed of emancipation, free at the death of the testatrix, when the will speaks and takes effect, she was then capable of taking by devise or bequest, or by descent as heir to her mother. But all the other children and grand-children of the testatrix, the intended beneficiaries, being then slaves, the provisions of the will and codicil are wholly inoperative to confer any benefit or right upon them or any of them. If the codicil is void as to the benefit intended for the children of Robin, is yet, by giving to them instead of the plaintiff one half of the property, effectual as

4. The bastard child of a free person of color is heir to the mother.

5. A devise was made to slaves, who could not take, and a devise over to others in case the first devisees die without issue: held that the first devisees being incapable of taking, being slaves, that the devise over was void, and that the heir-at-law must take.

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a revocation of the devise of that half to the plaintiff, and operates to put her out of the will, then she is entitled to nothing under the will. But she is the only heir of the testatrix, and the sole question is whether, because all the interests which the will intended to create and to prefer to that of the children of Mrs. Collins are, *ab initio*, void, by reason of the incapacity of the intended beneficiaries, that interest, though by the terms of its creation it is contingent and ulterior, is to become absolute and immediate, and thus to preclude and forever defeat the claims of the heir; or whether it shall await the contingency on which, by the will, it is made to depend, leaving the property to pass until the contingency happens, as if there were no will. There might, indeed, be some question whether the testatrix intended to give the property to the children of Mrs. Collins in any other event than that of the death of her own daughters, (Cathy and Delphia,) and of their children, without issue before her own death, since, upon the failure of issue described, she gives to the children of Mrs. Collins whatever she, (the testatrix,) may possess; which naturally refers to the time of her death, and not to a subsequent period, before the arrival of which her property might, under the previous clauses of the will, be greatly diminished. But we waive this question, because the answer whether affirmative or negative, though it might determine the extent of the plaintiff's interest, if she has any, would still leave its existence or non-existence dependent on the same inquiry which was before stated. It could not possibly be more certain that the testatrix did not intend the contingent interest to take effect unless her daughters, and their children should die without issue in her lifetime, than it is that she did not intend it to take effect until there should be such failure of issue at some period. And as upon either construction the contingency has not happened, the difference between them is, that according to one construction it never can happen, but according

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to the other it may happen, and is in fact in suspense, so long as either of the daughters, or any of their children, are living. There is no doubt as to what was the intention of the testatrix in the contingency described, and which certainly has not yet happened; nor is there any doubt as to her intention if the contingency never happens, or until it does happen. The real question is, whether in violation of that intention the ulterior or postponed interest can be brought forward and made to take effect immediately and to the disinherison of the heir, before the happening of the contingency. In general, he who claims under a will must claim according to the will, and not in violation of it. And although if a particular estate be given to A for life, with remainder to B, the remainder being vested will take effect in possession, whenever the particular estate is out of the way, though in the lifetime of A, yet if the remainder be contingent, it can never take effect until the happening of the contingency; and by the common law the previous destruction or limitation of the particular estate, instead of bringing the remainder prematurely into effect defeated it altogether.

This will, however, in the devise or bequest to the children of Mrs. Collins, presents not the case of a remainder, to take effect after the termination of a particular estate, but of an executory devise, to take effect upon the contingency of the death of two named persons, and their children without issue. In the nature of an executory devise, this ulterior interest has no connection with, or dependence upon the previous interest, but depends wholly upon the contingency, which may or may not terminate a previous interest created by the same instrument. And although in the present case the same contingency which is to give effect to the executory devise, also terminates, according to the original will, a previous interest created by the same will, this circumstance does not make the one dependent on the other. An executory devise may, unlike a remainder, be valid

6. In case there be an executory devise, to take effect upon the death of a particular person without issue, the ulterior devise having no connection with, or dependence upon the previous interest, but depending upon a contingency, which may or may not terminate a previous interest created by the will—held, that the executory devise could not take effect until the contingency

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occur, tho' the
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law should take.

and take effect without any partial estate or interest to precede, and in the language applicable to remainders, to support it; and as it may take effect upon the happening of the contingency, though the preceding estate or interest may have previously ceased from some other cause, so it seems to us that it must always wait for the contingency, and cannot take effect before that occurs, whether the estate or interest intended to precede it or to be substituted by it be void, *ab initio*, or cease or become void otherwise than by the contingency, and before its occurrence.

If it be said that by giving to the children of Mrs. Collins, if the prior devisees should die without issue, the property first given to them, the testatrix shows that these ulterior devisees were the next objects of her bounty, and that the first being incapable, the next should take the benefit intended for the first; it is still obvious that she did not intend the ulterior devisees to take, so long as the primary devisees should live, nor until they should die leaving no issue. And although their incapacity to take under the will defeats her intention to benefit them, this does not seem to be a sufficient ground for abrogating or disregarding the manifest intention that the ulterior devisees shall not take until the contingency happens.

It may be assumed that the testatrix did not know that her children and grand-children could take nothing under her will. She intended and expected that they should take at her death the property given to them, and that the children of Mrs. Collins should only take in the event that the children and grand-children should die without issue. This is not like the case of the death of a devisee in the lifetime of the testator, in which case, if there be a further disposition of the subject, that disposition, by the general law, takes effect not against but according to the will of the testator, who, by the further disposition, provides, in effect, for the event which may

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have defeated his preference. Here the ulterior disposition is intended to provide, not for the incapacity of the first devisees, or for the failure of the devise on account of their disability, but only for the contingency of their death without issue. It is to be observed, too, that if the plaintiff is displaced from the will by the codicil, the contingency still being the death of herself and sister and their children, without issue, there is no connection between the contingency and the devisees who are to take her share. And as the plaintiff and her children might be the last survivors of the persons referred to in the contingency, and would still be entitled to nothing under the will and codicil, even if they were effectual according to their own terms, it might be, that the contingency would have no relation to any person whose estate under the will would be divested by its happening. And as this is certainly the case with regard to that half of the estate devised to the grandsons by the codicil, and might be the case with regard to the other half devised to the daughter Caty and her children by the will, we think that even upon the face of the will and codicil the devise over to the children of Mrs. Collins may be regarded as in effect the same as if made upon the contingency of the death, without issue, of persons to whom nothing had been given by the will, and who could not take anything under it. Though A and B may both be strangers to a testator's blood, he has power, by his will, to give his estate to B in case he should survive A, or in case A should die without issue; and however inexplicable the motive for referring to such a contingency might be, when A neither had the estate nor could take it by implication, we suppose the validity of the contingency and subsequent devise could not be questioned; and that although the person referred to therein could take nothing by the will or by descent from the testator, the devise over could not take effect until the happening of the contingency. And why should it not be so in the pres-

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ent case? If it were true that none of the persons whose death without issue is made the contingency can take by the will, is it not the same as if there was nothing given to them? And must not the happening of the contingency, as described, be in this as in other cases, the sole condition upon which the devise over can take effect?

Again: suppose a testator to devise that if A, (who is his sole heir, but to whom nothing is given by the will,) should die without issue, B shall have his estate, the same not being otherwise disposed of, A would take the estate as heir, and B would take it upon the happening of the contingency and not before. And the effect would certainly be the same, though the contingency embraced the death without issue, not only of A but also of other persons named with him, and although they might be incapable of taking anything, either as devisees or heirs of anybody. Or suppose the testator, after making a devise which is wholly void, devises the estate over upon the contingency of the death, without issue of A, (his only heir,) or of A and others capable or incapable of being heirs or devisees. The voidness of the primary devises would certainly not affect the validity of the contingency, and if the incapacity of all the persons named in it might make it void, (which we do not admit,) certainly the capacity of A, the heir, would sustain it, though all the others should be incapable. And it seems impossible that its validity should be affected by the fact that the incapable persons named in the contingency had themselves been the primary devisees. But the plaintiff is the sole heir of the testatrix. And if the contingency would have been void, in case it had referred to none others but slaves, (which is not admitted,) it seems to us that the capacity of the plaintiff to take, both as heir and devisee, and the fact that she is the sole heir, must suffice to make it valid, and that being valid, and the express condition on which alone the ultimate devise is to take effect, it must avail to post-

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pone that devise, so that it cannot by any construction take effect until the happening of the contingency on which it is made to depend. If the contingency were even void, we do not perceive how that would help the devise to which the happening of the contingency is, in terms, a condition precedent, and which can, in no other way, become effectual, according to the will. Nor, indeed, do we perceive how a contingency, which, in the nature of things, may happen, and which involves no illegal or immoral act or intention, can be deemed void.

Conceding, then, that the primary devisees are all void in consequence of the incapacity of the devisees, does that voidness operate for the benefit of the heir until the contingency shall happen, on which the ulterior devise depends, or shall it operate to the benefit of the ulterior devisees, by giving immediate effect to their interest, which the will expressly postpones till the happening of the contingency? These devisees have no claim or interest in the estate, but that which the will gives them. The will gives them none but upon the contingency described. As that is the only condition on which they are let into the estate, the intention is to exclude them, unless and until the condition happens. It is true the intention also is to exclude the heir, and if the will were effectual, and so far as it is so, it does exclude him. But the heir has a different title. He can claim against the will, and whatever is not devised is his; and as the devises to the slaves in this will are void, there seems to be reason as well as justice in saying that the interest, which is, in words, given to them, being in effect undevised, shall go to the heir as if it were blotted out of the will, rather than that by an artificial construction the ultimate devisees, who were intended to have nothing until the happening of a designated contingency, shall, before that has happened, take immediately, to the exclusion of the heir, all that was intended for the preferred devisees.

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Upon the question, as here presented, we find no direct authority, but there is a strong analogy in those cases in which the question has arisen between the heir and the residuary devisee or legatee, as to the right to the benefit of a void bequest of the proceeds of real estate bequeathed to a charity. Upon that question the weight of authority seems to be in favor of the heir. (1 *Jarman on Wills*, 5th ed., page 303, 309.) The same preference is established by the 20th section of the Revised Statutes upon wills, (*Revised Statutes*, page 696,) which enacts, in substance, that in case any devise in a will be void, or cannot take effect, and there be a residuary devisee, the estate embraced in the void devise shall, unless a contrary intention appear by the will, go to the heir and not to the residuary devisee. If, therefore, the devise to the children of Mrs. Collins had been residuary instead of contingent and executory, there would have been strong ground even on the score of judicial authority for determining in favor of the heir, and such a determination would be peremptorily required by the statute, which must be regarded as being founded upon deliberate views of justice and policy; and as furnishing, therefore, strong evidence of the requirements of both. And yet in the case supposed, as in the one actually before us, the first devisees being incapable, the devises to them would be void, the residuary devisees would be as certainly the next objects of the bounty of the testatrix, and upon the whole will, the only objects capable of receiving and enjoying it, and their right would not, as in this case, depend, by the terms of the gift, upon an extraneous contingency which might never happen; nor would it be any more certain that they were not intended to take that which was devised to others, incapable of taking, than it is now that they were not intended to take it before the happening of the contingency on which it was devised to them. The interest intended to be given by the void devises in this will is the whole estate, or

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the profits of the whole from the death of the testatrix until the happening of the contingency. It is a fee defeasible by the happening of a designated event, on which the estate is devised over. From this defeasible fee, the intention of the testatrix excludes the ultimate devisees; and upon the principles of the statute, and of the authority referred to, that defeasible interest goes to the heir. But if upon scrutinizing the nature of the contingency it appears to be too remote, as not being limited to a life or lives in being, and twenty-one years afterwards, the consequence is that the devise over is void, and the interest first given is absolute and free from condition. And in this view, which we deem correct, the heir would be entitled to the absolute interest in the entire estate, to the exclusion of the contingent devisees, the devise to whom is upon the face of the will void.

It is sufficient, however, for sustaining the petition on demurrer, that the plaintiff has at least the defeasible interest intended to have been given to the primary devisees in the will and codicil, and especially with the allegation, which shows the great improbability that the contingency ever will happen; nor is it certain that the void devise to the children of Robin revokes the gift to the plaintiff. Under any aspect of the case, as presented by the petition, we are of opinion that the plaintiff has at least a *prima facie* right to the relief sought, or to some relief; and that the court erred in sustaining the demurrer and dismissing the petition.

Wherefore, the decree is reversed, and the cause remanded, with directions to overrule the demurrer, and for further proceedings.

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APPEAL FROM LOUISVILLE CHANCERY COURT.

1. The execution of a deed of trust by one member of a firm, with the assent of the other, is valid, and is a waiver of any lien; and partnership creditors can assert no lien which he could not assert.
2. A provision in a deed of trust that the trustee shall "sell at fair and reasonable prices," is not such a restriction on the power of the trustee to sell as renders the deed fraudulent.
3. Nor is a deed of trust which conveys all and every description of property belonging to the grantors to be regarded as fraudulent because of the farther provision, "that the property will be more particularly set forth in an inventory to be made out."
4. Nor is it fraudulent in a deed of trust that it provides that after the payment of specified debts, the surplus, if any, shall be paid to the grantors. This it would be the duty of the trustee to do independently of any express provision on the deed to that effect. The interest of the grantor, in a deed of trust, is analogous to that of a mortgagor.
5. Any interest which a mortgagor or grantor has in a deed of trust can be subjected to his debts.

The facts of the case are stated in the opinion of the Court. *Rep.*

Bullitt & Smith for appellants—

The appellees, Hair & Nugent, made an assignment of property to the defendant O'Neal, for the payment of debts due to a part of their creditors—one of whom is preferred over the others—which assignment the appellants seek to set aside as fraudulent, and made with the intent to defraud them and other creditors of the grantors. No depositions were taken. To prove the fraud the appellants rely upon upon the face of the deed and facts appearing in the pleadings. The chancellor dismissed the petition so far as it sought to vacate the assignment, of which appellants complain.

1. It is insisted that the provision in the deed requiring the assignee to sell "at fair and reasonable prices, and to the best advantage," is evidence of

fraud. The effect of the provision of the deed is that the trustee, who is bound to pursue the mode of sale prescribed by the deed, (1 *Pet.* 138,) cannot sell the property except "for fair and reasonable prices, and to the best advantage."

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2. The creditor has the right to have the property sold for the best price it will bring, and if the deed require a delay of sale to get high prices, the deed will be fraudulent. (*Hart vs. Craine*, 7 *Paige's Chancery Reports*, 37.) A deed was held to be fraudulent because it was recited upon its face that it was made to prevent sacrifice. (*Ward vs. Trotter*, 3 *Monroe*, 1.) Creditors have the right to sacrifice the debtor's property, if sacrificed it must be; to sell it for what it will bring, and any attempt to deprive them of that right is fraudulent. In the case of *Vernon vs. Morton & Smith*, 8 *Dana*, 247, a deed containing a provision for a sale "at fair and reasonable prices, and to the best advantage," was sustained by this Court; but that deed was attacked upon other grounds. The provision just cited does not appear to have been noticed by either counsel or court, and the question was not decided.

3. The deed conveys to O'Neal all the property of the grantors, of every kind and description, "which shall be more fully set forth in an inventory, which shall be hereafter made out, and in which the property aforesaid shall be described." This conveyed no more property than might be specified in the inventory to be made out. 1. If it be regarded as a conveyance of all the property of the grantors it is void, because it provides only for part of the creditors, and reserves the surplus to the debtors, not by express words but by implication and operation of law, which gives the grantors the surplus, as though it had been reserved.

It is alleged in the amended petition, and not denied, that the grantors owed other debts to a large amount not provided for. Only part of plaintiffs' demands are provided for by the deed.

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A deed of trust is rendered void by any benefit reserved to the debtor. (1 *American Leading Cases*, 81.) There is a conflict between the authorities on the question whether reserving the surplus to the debtor, either expressly or by implication, after payment of part of his creditors, is such a benefit reserved as should render the deed void. Most of the cases may be reconciled by considering the distinction between a general and partial assignment. A man may dispose of his property as he please, if he retain enough to pay his debts; but if he owe more than he is worth his power to dispose of his property becomes limited and restrained by law—he cannot dispose of any part of it except for the benefit of his creditors. If he convey the whole in trust for part of his creditors, reserving a surplus for himself, it is obvious—1st. That to the extent of the surplus the deed is for the benefit of the debtor. 2d. That he retains nothing whereby to pay debts not provided for in the deed; the deed therefore shows upon its face an intention to defraud or to hinder and delay the pretermitted creditors, and is void. The distinction just adverted to is recognized in *Harris vs. Sumner*, 2 *Pick.* 129, 134; *Eastwick vs. Cailland*, 5 *Tenn. Reports*, 420; *Wilkes vs. Farris*, 5 *John. Reports*, 385. In the last case an assignment providing for only a part of the assignor's creditors, and reserving the surplus to the assignor, was sustained expressly upon the ground that it conveyed only a part of the assignor's property. In *Rehn vs. McElrath*, 6 *Watts*, 151, an assignment of all the debtor's property for the benefit of part of his creditors, and expressly reserving the surplus to the debtor, was sustained.—This is the only case referred to on that side of the question in the 1st edition *American Leading Cases*, 82. In a late edition of that work two other cases are referred to as holding the same doctrine—*Hindman vs. Dill & Co.*, 11 *Alabama Reports*, 689; *Austin vs. Johnson*, 7 *Humphreys' Reports*, 191. In both of these cases the assignments embraced part only of the

debtor's property. On the other side of the question stand *Sydam & Jackson vs. Martin, Wright*, 698; *Goodrich vs. Downs*, 6 *New York Reports*, 438, in which the surplus was expressly reserved to the assignor, after paying the debts of his creditors, and *Dana vs. Lull & Co.*, 2 *Washburn*, (Vermont,) 390; which is like the present case. *Hooper vs. Tuckerman*, 3 *Sandford's C. C. R.*, 311, shows that an implied reservation has the same effect as if expressed.

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4. It is insisted that the deed is void not merely as to the surplus, but entirely void, and whether there appear to be a surplus or not.

In the case of *Brady & Davis vs. Halbert & Hall*, MSS. opinion of January, 1852, that a debtor may lawfully prefer such of his creditors as may release their demands within a certain (reasonable) time, provided the surplus is appropriated to those who refuse to release; but without such provision the deed would be void, because the surplus, after paying the creditors who release, results to the debtor instead of being appropriated by the deed to the other creditors. We insist this deed is void because a benefit results to the debtor himself.

But the deed in this case did not convey all the property to O'Neal, but only such property as was described in the inventory afterwards made out. No inventory was filed with the deed. It was made out more than a month afterwards. It embraces only a part of their property. The assignors owned property at Cincinnati of considerable value, not embraced therein nor delivered to O'Neal, as is alleged in the second amended petition, and not denied. It appears, from a deed filed with the answer, that after making the inventory Hair & Nugent conveyed the Cincinnati property to another assignee in trust for all their creditors.

It is insisted that the true construction of the deed is that only such property passed as is described in the schedule. As to the language of the conveying clause it is a principle of construction that if a gen-

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eral clause is followed by special words which accord therewith, the deed shall be construed according to the special matter. This rule applies to this case. (See *Wilkes vs. Faris*, 5 *Johnson's Reports*, 335; *Wood vs. Rowcliff*, 5 *Law and Equity Reports*, 471; *Driskall vs. Fiske*, 21 *Pick.*, 503.) The inventory is a limitation on the conveyance. O'Neal so regarded the inventory, and did not take possession of any property not set out therein. The assignors so regarded it, and did not deliver to O'Neal the Cincinnati property, but conveyed it to another trustee on a different trust.

Any attempt by a debtor to place his property in a position which may enable him to force his creditors into a compromise of their demands, or any attempt to retain a control over it, after conveying it to a trustee, is fraudulent. Thus a power to revoke either in whole or in part, either as to the property or as to the creditors to be paid, or the right to change the order of preference, or gives the trustee such right, or giving the trustee the right to compromise with creditors, is fraudulent. (*Murray vs. Riggs*, 15 *Johnson's Report*, 571; 2 *Ib.*, 565; *Grover vs. Wakeman*, 7 *Wendell*, 187; *Grayam vs. Pointts*, 4 *Alabama Reports*, 374.) So where a debtor confessed judgment for \$25,000 to secure \$2,850, and such other debts as he might designate, was held fraudulent. (*Sewell vs. Russell*, *Paige's Chancery Reports*, 175.) So a deed providing for the payment of such debts as should be specified in a schedule within sixty days, and annexed to the deed, was held fraudulent. (*Averill vs. Lucks*, 6 *Barbour Sup. C. R.*, 475.) So reserving the right to retain possession and make sales, accounting to the trustee, is fraudulent. (*Long vs. Lee*, 3 *Randolph*, 410.) So conveying the possession to a trustee without the title. (*Whallon vs. Scott*, 10 *Watts*.) In the latter case the court say, in substance, that courts can keep this right to make assignments within proper bounds, and prevent the introduction of new fangled devices and contrivances, which may

run into licentiousness and abuse; and while he may grant preferences to favored creditors, on the other hand he must part with his property and the possession, free from control over, or interference with it, and without any power, upon any contingency, to resume it at as his pleasure.

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N. Wolfe for appellee—

The plaintiffs, now appellants, filed their bill to set aside a deed of trust made by appellees to O'Neal, for the benefit of their creditors. The grounds assumed by them are—

1st. That the deed did not transfer to the assignee *all* the property of the grantors.

2. That the deed required the assignee to sell the property conveyed, "at fair and reasonable prices, and on the most advantageous terms."

3. That the deed of assignment was made by Nugent alone, and not by Hair and Nugent. And for these reasons it is asked that the deed be set aside as fraudulent.

The appellees contend—1st. That *all* the property of Hair and Nugent was transferred to O'Neal, the assignee, by the deed to him. That the deed expressly conveys to him all the property of Hair & Nugent of every description. They owned no real estate. Their property consisted of dry goods, and in order that their creditors might have the full benefit of their property, Hair made a conveyance in Cincinnati for the benefit of their creditors there.

2. That Hair, by parol, authorized Nugent to execute a deed of assignment, conveying the property of the firm for the benefit of their creditors, and in addition thereto, before this institution of the suit, executed a writing confirming the deed of assignment, which was known to plaintiffs' counsel before the suit was brought.

The deed is according to the usual form of such deeds. It reserves no property to the grantors; all is conveyed unconditionally to the trustees. It is

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similar in its provisions to the deed in the case of *Vernon & Averill vs. Wilcox & Lynde*, 8 Dana, 248, which this court held to be valid.

It is said that Hair, the other partner, made a similar deed in Cincinnati, to pay the debts of the firm, and that this fact is not denied. And from this it appears that Hair & Nugent conveyed all their property, both in Louisville and Cincinnati, for the payment of their debts.

The trustee, O'Neal, took immediate possession of the goods, and was proceeding to execute the trust when this suit was brought. The fact that the goods in Cincinnati were not included in the schedule, cannot affect the validity of the deed. By the terms of the deed all the property of the firm passed to the trustee, and although the schedule may have omitted a part of the goods, the right of the assignee is not thereby restricted to such as are set out.

But it is objected that by the terms of the deed which authorizes a sale of the goods "for fair and reasonable prices, and in the most advantageous manner," that such provision was calculated to give too great latitude to the trustee, and to hinder and delay creditors. To this it is answered that the deeds in the case of *Vernon & Averill vs. Wilcox & Lynde*, *supra*, containing a like provision, almost in the same words, was held to be valid; and in the case of *Christopher vs. Covington*, 2 B. Monroe, 357, this court held a deed of assignment to be valid, which provided that the trustee should sell after three months. In that case the court said, "in every such assignment some delay is unavoidable. It is not, therefore, the fact of delay, but its character and the motive which actuated it, that is deemed fraudulent."

To the objection made, that the deed was made by Nugent alone, it is answered, that the answers of both Hair and Nugent show that it was agreed that the assignment should be made by Nugent before it was made. It is further shown that Hair, after the deed was executed, and before the institution of this

suit, confirmed the deed which had been made. This should dispel all doubts, if any ever existed, as to the binding effect of the deed. An express authority, by parol, by one partner, will be sufficient to bind him even by a sealed instrument. (See *McCoit vs. Lewis*, 2 B. Mon. 267. See, also, 1 Hall, *New York Rep.* 262.) The power of one partner to make a deed of assignment of personal effects, in the absence of his co-partner, is unquestionable. The following authorities are cited: (See *Robinson vs. Crowder*, 4 *McChord's L. R.*, 519; *Mills vs. Barber*, 4 *Day*, 428; *Harrison vs. Sterry*, 5 *Cranch*, 300; *Anderson vs. Tompkins*, *Brockenborough*, 456.) In this case Chief Justice Marshall affirms the authority of one partner to make an assignment of partnership effects for the benefit of creditors.

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Muir & Riley on the same side—

We will not repeat the argument of our co-adjutor.

The grantors stipulated for no delay in the sale of the goods. They imposed no conditions incompatible with the interest of creditors, nor in any manner to delay creditors in the collection of their debts.—The right to prefer creditors is undoubted.

The deed shows no other object but the payment of the debts and liabilities of the partnership. All intention of fraud is denied, and there is no proof of any. An affirmance is asked.

Judge SIMPSON delivered the opinion of the Court.—

The deed of trust which was executed by Nugent, one of the members of the firm of Hair and Nugent, was made by him with the assent of the other partner, who subsequently ratified it by a written instrument expressly executed by him for that purpose.—The deed, however, having been executed by one partner, with the knowledge and assent of the other, was valid without such subsequent ratification. The creditors of the firm had no lien on the partnership

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1. The execution of a deed of trust by one member of a firm, with the assent of the other, is valid, and is a waiver of any lien; and partnership creditors can assert no lien which he could not assert.

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effects, and any lien thereon which they would have derived through one of the partners, if the deed had been executed against his will, and without his assent, was lost by his act. He could not have asserted such a lien himself, inasmuch as he had waived it by assenting to the execution of the deed; and the partnership creditors can only assert a lien on the partnership effects, when it can be done by a member of the firm.

There is no extrinsic evidence of any fraudulent intent in the execution of the deed, but it is contended that the deed itself furnishes intrinsic evidence of the existence of such an intent; and several of its provisions are referred to as sufficient of themselves to render it illegal and void.

2. A provision in a deed of trust that the trustee shall "sell at fair and reasonable prices," is not such a restriction on the power of the trustee to sell as renders the deed fraudulent.

1. The authority conferred upon the trustees to take the effects conveyed into his possession, and to sell and dispose of them at *fair and reasonable prices* and to the best advantage, is objected to as being a restriction on his power, and equivalent in its legal effects to an express limitation on his right to sell, unless he could get a price fixed in the deed itself, if one had been named. We do not think that it is susceptible of such a construction, or that it imposes any restraints whatever on the power of the trustees. It is his duty to sell the property for a fair and reasonable price; and whatever price he can obtain for it, upon a sale fairly made, is in legal contemplation a fair and reasonable price. The law, independent of any such provision, would not permit him to sell the property at an unfair and unreasonably low price, when he could have made a sale at a better price, and one that would have been more advantageous to the creditors. Such conduct on his part would amount to a breach of the trust, and render him individually responsible to the beneficiaries in the deed. The clause under consideration imposes no greater restraint upon him than the law itself does in the execution of the trust, and cannot be regarded as furnishing any evidence of a fraudulent intent.

2. An objection is made to that part of the deed which describes the property conveyed, on the ground that nothing passed by it, except such articles as might be contained in the inventory thereafter to be taken, and that thereby the grantors in the deed were able to increase or diminish the quantity of the property conveyed at their discretion, until the inventory was made out. If such be the legal effect of the deed, it might be assimilated with great propriety, to that class of conveyances which have been deemed to be fraudulent; because the debtor reserved the power to revoke the deed, either as to the property conveyed, or as to the creditors to be paid, or reserved the right to change the order of preference, or gave the trustee the power to compromise with the creditors. (15 *John. Rep.*, 571; 7 *Wend.*, 187; 2 *John. C. R.*, 565.) But we do not give such a construction to this deed. The language used is that "the parties of the first part have granted, bargained, sold, conveyed, assigned, and transferred, and by these presents do grant, bargain, sell, convey, assign, and transfer to James O'Neal, of the second part, &c., all the goods, wares, merchandize, &c., and property of every name and nature whatsoever, of, and belonging to said party of the first part, which will be more fully set forth in an inventory which will be taken hereafter, and in which the property aforesaid will be described." The deed conveys all the property of every description which belonged to the grantors. The language is broad and comprehensive, and cannot be construed so as to limit the operation of the deed to such property as should be described in the inventory referred to. The office of the inventory was to describe the particular articles which constituted the property that had been conveyed by the deed. Its failure to contain a full and true description of such property could not diminish the legal effect of the conveyance. The deed conveys all the property of the grantors, and not merely that part of it which might be contained in an in-

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3. Nor is a deed of trust, which conveys, all and every description of property belonging to the grantors to be regarded as fraudulent because of the further provision "that the property will be more particularly set forth in an inventory to be made out."

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4. Nor is it fraudulent in a deed of trust that it provides that after the payment of specified debts the surplus, if any, shall be paid to the grantors; this it would be the duty of the trustee to do, independently of any express provision in the deed to that effect. The interest of the grantor in a deed of trust is analogous to that of a mortgagor.

ventory thereafter to be furnished by them. This objection to the deed is therefore wholly invalid.

3. The deed provides that the surplus of the proceeds of the property, if any, after the debts are all satisfied, shall be paid over by the trustee to the makers of the deed. This, it is contended, is such a reservation for their benefit as renders the deed void in law; and cases have been referred to in which the courts in some of the states have so decided. (*Dana vs. Lull & Co.*, 2 *Washburn*, (Vermont R.,) 390; *Goodrich vs. Downs*, 6 *Hill's N. Y. R.*, 438, and other cases.) A contrary doctrine has been held in the following cases: (*Rehn vs. McElrath*, 6 *Watts*, 151; *Hindman vs. Dill & Co.*, 11 *Alabama R.*, 689; *Austin vs. Johnson*, 7 *Humphrey's Report*, 191.)

Such a reservation as the one here objected to, does not invest the makers of the deed with an interest in the surplus which they would not have if the deed did not contain such a reservation. In such a case, if any of the trust fund remained after satisfying the trusts expressly created by the deed, there would be, as to such surplus, a resulting trust for the benefit of the grantors. Indeed the cases in which deeds of this description have been pronounced void, place those containing such a reservation, and those in which it is omitted, upon the same footing, unless the latter transfer the surplus, if any, to the general creditors. The principle upon which these decisions are based, seems to be that a debtor has no right to make a conveyance of the whole of his property to secure one of his creditors, or any number of his creditors, so as to give them a preference over the others, unless in the same conveyance he secures the residue of the property that may remain, after the debts of the preferred creditors shall be discharged, so that it shall not return into his hands, but shall be applied to the payment of the debts due to the other creditors.

This principle, which in effect determines that the debtor, although he may give to one class of creditors

a preference over another class, cannot legally exercise this right without making a provision in the same conveyance, that the surplus, if any, shall be applied to the payment of his other creditors, so far from having been acted upon or recognized in this state, is in direct conflict with all the decisions of this court, and they are numerous, in which mortgages and deeds of trust that did not contain any such disposition of the surplus, have been sustained. Under the operation of this principle, if carried out to its legitimate results, a debtor could not mortgage his estate so as to retain an equity of redemption therein, at least until all his debts were first satisfied. A mortgage of his estate to one creditor alone would be void if he had other creditors, unless in the same deed he made provision for the payment of their debts out of the estate mortgaged. Mortgages and deeds of trust, with respect to a sale of the property embraced by them, are placed substantially upon the same footing by the laws of this state. No sale can be made under a deed of trust without the intervention of a court of equity, unless it be made with the consent of the grantor. A sale of the mortgaged property may be made in the same way, the mortgagor and mortgagee concurring therein. Every reason then which can be urged in favor of the application of this principle to deeds of trust, will apply with equal force to mortgages. Its effect, if adopted, would be to alter essentially the right of the debtor to convey his property to secure any of his creditors, as this right has been heretofore exercised, and to introduce a new rule of law on this subject that has not hitherto had any existence in this state.

The adoption here of such a principle is not necessary to the security of the rights of creditors. Any interest which the grantor has in the property mortgaged or conveyed in trust, can be subjected by them, under our laws, to the payment of their debts. The debtor can derive no advantage from the reservation to himself of the surplus that may remain, after the

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5. Any interest which a mortgagor or a grantor has in a deed of trust can be subjected to his debts.

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payment of the debts mentioned in the deed. If the effect of such a reservation would be to secure the surplus to the debtor, and deprive his creditors of the right to subject it to the payment of their debts, then, indeed, there would be an obvious propriety in the application of this principle. But no such effect is produced by it; on the contrary, the reservation is entirely nugatory inasmuch as it only appropriates the surplus in the same manner the law itself would, if no such reservation had been made, and such surplus, notwithstanding this appropriation of it, still remains liable for the debts of the grantor. The legality of the deed is not therefore affected by the reservation of the surplus, if any, to the grantors.

Wherefore, the judgment dismissing the plaintiffs' petition is affirmed.

Case 19.

Ætina Insurance Company vs. Jackson, Owsley & Co.

PET. EQ.

APPEAL FROM LOUISVILLE CHANCERY COURT.

AND

Jackson, Owsley & Co. vs. Ætina Insurance Company.

ON CROSS-ERRORS.

1. An agent or consignee, having the property of his principal in his possession, and responsible for it, may, and especially if he have an interest in it, though it be only for his commissions, insure it in his own name, and in case of loss recover its full value—holding all beyond his own interest in trust for the owners of the property. (*Story on Agency*, section 111; *Hewitt, Allison & Co. vs. Franklin Insurance Company*, 3 B. Monroe, 231; 1 *Mall*, 189.
2. Policies of insurance should be liberally construed to effectuate the intention of the assured.
3. A policy insuring all the articles constituting the stock of a port-house, and all articles contained within the building described and appurtenant thereto, covers all within those buildings, without regard to the particular ownership of each or any article which was at the risk of the insured.

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16bm242	132	24

4. Contracts are to be construed according to the intention of the parties thereto. A contract to sell 40,000 hams, to be paid for on delivery; the hams were inspected and invoiced, but not delivered or paid for: held that the contract was executory, and property not changed, and if insured protected by the policy. (*Philips on Insurance*, 1st vol., 27; 4 *Massachusetts Reports*, 336.)
5. A vendor of personal property, to be paid for on delivery, parts not with the title until payment; if the price is not paid in a reasonable time he may resume his original ownership, as upon a rescission of the contract. (*Story on Contracts*, sec. 809; *Chitty on Contracts*, 427, and authorities there cited.)
6. A vendor of goods not delivered, but to be paid for on delivery, has a lien on the property retained in possession for securing payment, and it is upon the presumption that the agreed price is the fair value, and cannot be enhanced by any fluctuation in the value; and if the goods be insured the vendor is entitled to the insurance corresponding with interest insured. Any interest remaining in a vendor, who has made a contract of sale, remains protected under an existing insurance. (8 *Mass. Reports*, 516; 5 *Pick.*, 76; 19 *Id.*, 81; *Am. Lead. Cases*, in note to the case in 8 *Mass. Reports*.)

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The facts of the case are stated in the opinion of the court. *Rep.*

G. A. & I. Caldwell for appellants—

Argued—1. That the third condition of the policy of the *Ætna Insurance Company* only bound the company to become ratably responsible, in case of loss, on the absolute property of Jackson, Owsley & Co. There is no such provision in this policy, as is contained in other policies, for liability for the loss of property belonging to others. There is no such provision as “or whom it may concern.”

There was taken by the assured eight policies, covering sixty thousand dollars worth of property—five of the policies covering twenty-five thousand dollars to Jackson, Owsley & Co; three to Jackson, Owsley & Co., “or whom it might (may) concern,” covering thirty-five thousand dollars. The undertaking in the policy, in this suit, is to pay a ratable share of the loss to the extent of \$25,000—the real loss by Jackson, Owsley & Co. This is shown to be \$8,000 92. The other insurances pay, of that sum, \$1,416 16. The balance is \$6,548 76, and for one fifth of this sum is the *Ætna Insurance Company* liable in this suit, and no more.

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We insist that by the third condition of the policy, in these words: "Goods held in trust or on commission are to be insured as such, otherwise the policy 'will not cover such property. * * * Goods 'on storage must be separately and specifically insured," that the \$18,000 worth of pork sold to Harbison & Hansboro, but still remaining in the house, was not covered by the policy in this case, but excluded by the terms of this third condition. (*Brichta vs. N. Y. Lafayette Insurance Co.*, 2 *Hall's N. Y. Reports*, 372.) This case is not contradicted by the case of *Hewitt, Allison & Co. vs. Franklin Insurance Co.*, 3 *B. Monroe*, 231, or *DeForest vs. Fulton Insurance Co.*, 81.

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The three policies covering property to the amount of \$35,000 embrace as well the property of Jackson, Owsley & Co. as of others; the five covering \$25,000 apply to the property of Jackson, Owsley & Co., and none others. The first three policies pay their proportion upon the whole loss of property in the pork-house. The five insuring \$25,000 pay only their proportion of the loss on \$25,000 of the property of Jackson, Owsley & Co., and not of others. It is insisted that any other apportionment of the loss would be to make a new contract for the parties.

The case in 5 *Hill's Reports*, referred to by appellees, is believed to be unsound, not law, and repugnant to common sense.

2. It is insisted, for appellants, that the view of the chancellor, in respect to the \$18,000 worth of meat sold by Jackson, Owsley & Co. to Harbison & Hansboro, is correct; that it constituted no part of the stock of the pork-house after the sale, and therefore not protected by the policy. (See *Willis vs. Willis*, 6 *Dana*, 48; *Crawford vs. Smith*, 7 *Dana*, 59; *Owsley vs. Sweeney*, 4 *B. Monroe*, 413.)

It is urged, on behalf of appellees, that though the title to the property may have vested in the vendees, Harbison & Hansboro, yet that appellees had still an insurable interest, and that they may recover to

the extent of the injury they may have sustained. This is not admitted. If the appellees wished to protect any insurable interest which they believed they had, they ought to have taken out a new policy—the old policy no longer covered it after the sale—

1st. Because it ceased, when sold, to constitute part of the stock of the pork-house, which was the only property covered by the policy. 2d. Because after the sale it was held in trust, and not covered by the policy any more than was the meat slaughtered for others. 3. Because it is the well established doctrine that “a sale of the interest insured during the continuance of the risk, divest the right of recovery under the policy.” (8 *Mass. Reports*, 115; *Carrol vs. Boston Marine Insurance Company*, 2d vol. *Am. Lead. Cases*; 11 *John.*, 302; *Philips on Insurance*, 108, and authorities before cited.)

The authorities relied on to show that an insurable interest remains protected after sale, applies to cases either where the sale is conditional, or where the legal title was retained by the vendor, to secure the purchase money. This case presents neither state of case. The sale was absolute. They had no right to retain the property except perhaps an equitable right to hold it to secure the payment of the price.

We ask a reversal.

O. G. Cates on the same side—

This record presents three question, two of law and one of fact. 1. Was there, at the date of the policy in this case, any custom or usage in existence in Louisville giving the appellees, as the owners of a pork-house, upon an insurance thereof, indemnity for loss of property held by them in trust for others? 2. Is the testimony of persons engaged in the business of insurance, and those engaged in pork packing admissible in the construction of contracts of insurance? 3. Is the written part of the policy of insurance to have the effect to render inoperative the

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printed conditions annexed thereto? If so, does the written covenant cover property held by the assured in trust for others, and to what extent?

The chancellor correctly decided that there existed no custom in Louisville where the policy was to operate in regard to the rule of adjusting loss in a pork-house, as none had ever taken place.

I do not concur with the chancellor in regard to the second proposition.

In respect to the construction of the policy, and the force of the term, "for account of whom it may concern," used in policies from the earliest times, and the effect of such words in securing property of third persons in the house insured, the court is referred to *Angell on Insurance*, page 47, sections 11, 12; *Park on Insurance*, 2 and 3; *Ellis on Insurance*, 91. The insured in this case regarded these words as important, or why so soon after the fire show such anxiety to have them inserted in the two policies issued by the agents, Kennedy and Atwood? But it is insisted that the policy is to be construed by its own terms, without the aid of extrinsic evidence, as show no charge of fraud in this case. (See 5 *Wendell's R.*, 541; 6 *Ib.*, 548; 16 *Ib.*, 399; *Angell*, sec. 12; 2 *Hall*, 375; 3 *Hill*, 501, 161; 4 *New Hampshire*, 171; 5 *Pick.*, 181.)

I do not concur with the chancellor in his construction of the policy. Its terms are these: "Do insure Jackson, Owsley & Co., against loss or damage by fire, to the amount of \$5,000 on pork, lard, bacon, bulk meat, hogs hanging, or otherways, salt, bags, kegs or barrels, and all other articles composing the stock of a pork-house, contained in their pork packing, lard, and smoke-houses." It is not supposed that pork, lard, bacon, &c., constitute part of the stock of a pork-house, but that the stock of a pork-house consists of salt, barrels, kegs, and other articles; in other words, all such articles as are necessary to convert live stock into pork, lard, and bacon. The case in 3 *B. Monroe*, cited by the chancellor, does not apply.

Though contracts of insurance are to be liberally construed to effect the purpose for which they were designed, yet this rule of construction does not authorize the rejection of one part of the instrument to give undue effect to another part. It is not denied that more effect may generally be given to the written than the printed clauses of a policy, because they are descriptive of the person insured, and subject matter of the insurance; and, if in this case words had been written, giving insurance on property in the pork-house of the assured and "others," or property generally "contained in their own pork-house," or on "pork as it might be from time to time in their pork-house," such, and similar words might have been sufficient to control the printed words, "that property held in trust for others is to be insured separately, otherwise not covered."

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No case has been found in which a policy containing words of like import with the one in this case has been held to cover property on storage, though there are cases which recognize the rule, that if a party has an interest in *different capacities*, he may insure both interests under a general policy, or under a general description.

The contract of insurance is one thing, and the rules which are to govern the adjustment of loss is another thing. They are the conditions annexed—the land-marks—beacon-lights—to direct the mind of the court in adjusting the rights of the parties. (1 *Duer on Insurance*, 19; 5 *Hill*, 188; 13 *Wend.*, 92; *Angell on Insurance*, 50; *Park on Insurance*, 2, 3; 13 *Massachusetts R.*, 172; 5 *Pick.*, 181.)

The sale by appellees of 40,000 hams to Harbison & Hansboro, worth \$17,938, is proved, yet the credit in the adjustment was only for \$13,000, and should have been for the entire sum of \$17,938, and upon an agreed case the costs should have been divided.

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This is in part an agreed case. It is admitted that in the pork-house of appellees there was a loss by fire to the amount of \$56,514 68, and they are entitled to recover. The amount of the recovery is subject of controversy. The loss of Jackson, Owsley & Co., in their own right, was \$19,938 98, and the loss as consignees and bailees was \$36,756 70, on which they had made large advances, and in which they were interested to the full value at the time of the fire.

Jackson, Owsley & Co., had made a contract to sell Harbison & Hansboro 40,000 bulk shoulders of hog meat for cash, payable on delivery. That 18,152 of these shoulders were not paid for nor delivered, and that they were destroyed by the fire constituting part of the loss.

The aggregate amount of the insurance on the entire stock of the pork-house was \$60,000, affected by various insurance companies by open policies, in the following proportions: one an open policy with Fellows & Co., for \$25,000; two others in the name of "Jackson, Owsley & Co., and whom it may concern," for \$5,000 each, and five of the policies were in the name of Jackson, Owsley & Co., for \$5,000 each. The appellants' policy is one of the last mentioned five, not containing the words "or whom it may concern," but describing in *writing* the stock insured in the following comprehensive language: "Pork, lard, bacon, bulk meat, hogs hanging, or otherwise, salt, barrels, kegs, and all other articles composing the stock of a pork-house, contained in their pork packing, lard, and smoke-houses, situated on the Bardstown turnpike, near the city limits."

2. The appellees insist that appellants are liable for one-twelfth part of the \$56,514 68, including the loss of the shoulders not delivered to, or paid for, by Harbison & Hansboro; and that there is no essential difference in the policies which do not contain the words "or whom it may concern," and those which

do contain those words. In this construction the chancellor concurs, though he held that the appellants were not liable for the shoulders contracted for by Harbison & Hansboro, and gave judgment for only \$3,737 and costs.

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It is here insisted on the part of the appellees that if there be any difference between the two sets of policies, that they have the right to apply the policies containing the words "or whom it may concern," to the loss on the *consigned* and *trust* property, and leave the other policies to be in like manner applied exclusively to the loss on the property of the appellees. If it be considered that the policies which do not contain these words cannot cover the *consigned* or *trust* property, and that the other policies do cover such property, then it would seem equitable, (as the entire property has been insured,) to exhaust the policies containing these words, by applying them to the *consigned* or *trust* property, and the other policies to the particular property of the appellees. This would be analogous to the equitable principle of applying securities, in such manner as to secure all; any other principle would convert a second insurance to the benefit of the first underwriter, than to the benefit of the insured, and in many cases leave the insured in a worse condition than if he had not made a second insurance.

Before the introduction of the clause into policies in regard to contribution, the course was for the assured to sue the *first* of the underwriters whose policy covered the loss, and leave him to seek contribution from the others. The object of this clause was to prevent circuitry of action, and by *abatement* to make *contribution*, and not to establish any new rule; but the clause has no application except in cases where the risk is the same. If they be the same, the underwriters are treated as joint securities for the same debt. If they be not the same, each is bound by his own policy for the entire amount, not

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exceeding the amount insured, and can compel no contribution.

If there is any difference in the policies, the risk insured against is not the same. By one set of policies the risk insured against would be the loss of appellees in their own right, which was \$19,938 98, and by the other set of policies the loss insured against would be by the appellees, "or whom it may concern," which embrace not only the \$19,938 98 but also the \$36,575 70. It is obvious that the risks here are not the same on the hypothesis of a difference in the policies, and consequently the principle of contribution would not apply. The result would be that the policies in the name of appellees would have been applied to the \$19,938 98, and the other policies exclusively to the \$36,575 70. See the case of *Scribner vs. Howard Ins. Co.*, 5 *Hill's Rep.*, for an express authority on this point.

3. But it seems to appellees' counsel that there is no difference between the two sets of policies, as to the liability of the appellants. Insurance was taken on the aggregate of \$60,000 worth of property, by a description essentially identical in all the policies. The object was to secure all the property whatever constituting the stock of a pork-house. The written description of the stock in all the policies is in substance the same, embracing *all the contents* of the pork-house, which is as comprehensive as the term "or whom it may concern;" and the omission of those cabalistic words neither enlarges or impairs the effect of the policies on the subject matter insured. The terms are broad enough to embrace meat on consignment, or otherwise held in trust or on commission.

4. But it is insisted by appellants that the printed conditions in the policy are opposed to our view, and must so be regarded, and that goods held in trust or on commission must be insured as such, and that the consigned meat is no where insured as such in the Ætna policy, and consequently that the policy, (dis-

pite the aforesaid written description,) must be restricted by construction to apply only to the *peculiar* and absolute property of the appellees. To this we reply, that consigned property is no where insured as such—that is to say by name—even in those policies which use the words “or whom it may concern;” nor do we conceive it necessary to describe by name consigned meat in a pork-house, in order to its protection. It is sufficient if the terms of the policy be clear and explicit enough to embrace it. Nothing more is required by the printed conditions. This is rendered more clearly evident from the nature of the business of a pork-house. The testimony shows it to be the very business of a pork-house in Louisville to receive and slaughter and pack pork and smoke it. It further shows that the appellees were instructed to insure; that appellees made advances on hogs, and held an interest in the entire stock of pork at the time of the loss.

It was, therefore, their duty and their interest and right to insure the entire stock, and not merely their own peculiar interest. And it must have been understood at the Aetna office that the application was for insurance upon the consigned stock, as well as the particular property of the consignees. Their “stock of meat” must have meant all the meat in the pork-house of whatever description, in which they had, or thereafter might have, an interest, through all the shifting changes and operations of the business. The testimony shows that no additional premium is demanded by insurers for the addition of the words “or whom it may concern,” in pork-house policies. We insist, therefore, that the policy is as broad as though these words had been inserted, and was so understood by the parties. (See *Hewitt, Allison & Co., vs. Franklin Insurance Co.*, 3 B. Monroe, 231.)

5. The printed conditions in this policy should not prevail over the written description. There is reason to believe that the printed conditions are never

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intended to apply, in any case, to a policy on the stock of a pork-house, but only to *goods* (that is the word,) held in trust or on commission. That printed condition is rarely if ever erased, even when inapplicable to the subject—as a building. The failure, therefore, to erase it in this case, when it has no application, should have no weight.

It is further stipulated in the body of the policy that the printed conditions are to have no effect when therein provided against, which means nothing more than that they have no effect when inapplicable, as is the case here.

6. But the printed conditions are not regarded as presenting any obstacle to the recovery sought in this case for another reason. It is in proof that the whole stock of meat was at the risk of the appellees, and that they were virtually the *owners* thereof. Aside from the printed condition, although a mere naked consignee may have no insurable interest, a party holding goods in trust or on commission, with power to sell, or an interest however small, has, by law, the right to insure them, and in case of loss may recover the full value of the goods, being liable, after indemnifying himself, to the real owner for the surplus. In this case Jackson, Owsley & Co. had an interest in the pork contracted to Harbison & Hansboro, equal to the full value thereof; it was held at their risk, and they had a right to recover the full value of the whole. (*Arnold on Insurance*, 164, 5, 6, and 252, 3.)

7. The shoulders sold were never paid for, never delivered; no notice that an invoice was made out was ever given to the purchasers. The contract was for cash, to be paid on delivery. The facts show a contract for sale, with mutual conditions; neither party could compel performance without offer to perform, on his own part, and this not having been done the sale was incomplete, and the right of property was in the appellees. (*Addison on Contracts*, 41.)

8. The right of property not having passed, the appellees had more than a lien right. They had a right of *dominion* over it, superior to a mere *lien*, growing out of his original ownership, and the buyer has no right in the thing purchased until tender of the price. (*Smith on Contracts*, 431.)

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9. But if the right of property passed in a qualified sense, there can be no doubt of the right of appellees to retain the possession, in virtue of the lien, for the unpaid price, and this gave the appellees an insurable interest. (*Philips on Insurance*, 1st vol., 27; *Stitson vs. Mass. Ins. Co.*, 4 *Mass. Reports*, 330; 1 *Philips on Insurance*, 3d ed., 122; *Warder vs. Horton*, 4 *Binney*, 529.) A vendor has an insurable interest. (*Fittermore vs. Vermont M. F. Ins. Co.*, 20 *Vermont Reports*.) So a vendor of real estate may recover for a loss happening after a contract of sale, where he retains the title to secure the purchase money. This does not conflict with the rule that an absolute sale of property, (which divests the seller of *all* interest,) will prevent a recovery on a policy of insurance. (2d vol. *Am. Lead. Cases*, 402; *Gordon vs. F. and M. Ins. Co.*, 2 *Pick.*, 258.)

10. Suppose all interest in the pork contracted to Harbison & Hansboro to have passed by the sale, still it was competent for appellees to make a contract to smoke them. This gave to appellees a right to retain them for that purpose, and until paid for that as well as the contract price, which was an insurable interest. (See 1 *Arnold on Insurance*, 229, 252; *Philips on Insurance*, 3d edition, 166-175.)

11. It is not necessary that the court should believe that the whole stock in the pork-house was at the risk of the appellees to entitle them to a full recovery for the lost property. If they were interested to a limited extent for advances made, or held the property for the purpose of sale, or otherwise controlling it, and especially if they had authority to insure it, and in the case of loss to recover the full value of both their own and the interest of the own-

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ers. (*Story on Agency, section 111; Franklin Insurance Company vs. Hewitt & Allison, supra; DeForest vs. Fulton Insurance Company, 1 Hall S. C. Reports, 84, which Judge Story approved.*)

We think the judgment of the lower court is for too small a sum, and ask that it be reversed on cross-errors, and that a judgment be rendered for \$4,709 55 with interest—being one twelfth part of the loss of the appellees, including the loss on the shoulders qualifiedly sold to Harbison & Hansboro.

October 8.

Chief Justice MARSHALL delivered the opinion of the Court.

By an agreed case made in the Louisville Chancery Court, between Jackson, Owsley & Co. as plaintiffs, and the Ætina Insurance Company defendant, it appears that in 1850 the defendant issued a policy for one year, but annually renewed by payment of the premium, insuring Jackson, Owsley & Co. against loss or damage by fire, to the amount of five thousand dollars on pork, lard, bacon, bulk meat, hogs hanging and otherways, salt, barrels, kegs, and all other articles composing the stock of a pork-house, contained in their pork-packing, lard, and smoke-houses, situated on the Bardstown turnpike, near the city of Louisville, with the privilege of rendering lard and smoking meat; also to affect additional insurance without further notice to that office, unless called for. But it was stipulated that if there were other insurance prior or subsequent, the insured, in case of loss or damage, should not recover of this company a greater portion of the loss or damage sustained than the amount hereby insured shall bear to the whole amount insured on said property. The third printed condition annexed to the policy provides that goods held in trust or on commission, are to be insured as such, otherwise the policy will not cover such property; and that in case of loss the names of the respective owners shall be set forth in the preliminary proofs, together with their respective interests therein; and that goods on storage must be

separately and specifically insured. The fourth condition is to the effect that if a policy be assigned without consent of the company, the liability thereon shall cease. And that in case of any transfer or change of title in the property insured by this company, such insurance shall be void and cease.

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The above mentioned policy was in force at the time of the fire, on the — day of —, 1853, when a large portion of the meat and other articles in the pork-house was destroyed. At the same time seven other policies were in force, of which four insured Jackson, Owsley & Co., to the amount of \$5,000 each; two insured Jackson, Owsley & Co., or whom it may concern, to the amount of \$5,000 each, and one for \$25,000 in substantially the same form. The sum covered by all of the policies together was \$60,000. The description of the property insured by each was in substance the same. It appears, however, that a large part of the pork, &c., in the house belonged to others than Jackson, Owsley & Co., the proprietors of the house. That the total loss of these articles by the fire was about \$56,500, of which property, to the value of \$19,938 98, was claimed by the plaintiffs as theirs, and the other property lost amounted to \$36,575 70. It appears, also, that a short time before the fire occurred, Jackson, Owsley & Co., had made a sale or an agreement for the sale of 40,000 shoulders of meat in the pork-house, part of that now claimed as their own, to Harbison & Hansboro, the terms and circumstances of which will be hereafter further noticed; and the defendants insist that the value of such part of these shoulders as was destroyed by the fire, amounting, as they claim, to about \$13,000, should be deducted from the claim of the plaintiffs for their own property destroyed. The defendants further insist that they are liable for nothing more than a ratable proportion of the loss upon the specific and peculiar property of the plaintiffs, whose property alone they say they insured; that the loss for which they are ratably liable is to be ascer-

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tained by first excluding from the estimate of the loss of the plaintiffs the value of the shoulders sold to H. & H. and destroyed by the fire, and then by applying to the residue of their claim for themselves, a rateable indemnity due from the three policies which insured Jackson, Owsley & Co., or whom it may concern, to the amount of \$35,000, and that their liability is only for one-fifth of the remaining loss. The plaintiffs insist upon the opposite of each of these positions, and claim that in each of the eight policies, whether the words "or for whom it may concern," be contained in it or not, the entire property comprising the stock of the pork-house, whether belonging strictly to themselves, or held by them for others, is covered to the aggregate value of \$60,000, that the defendants are liable for the rateable proportion of the whole loss estimated upon this basis, or that if there be the difference contended for between the effect of the policies, with or without the words "or whom it may concern," the five policies which do not contain those words should be applied without any aid from the others, to the peculiar loss of the plaintiffs, leaving the other policies to cover the remaining loss; and further, that notwithstanding the sale of the shoulders to H. & H., such interest, property, and risk remained in the plaintiffs, as that they continued to be covered and protected by the policy of the defendants, and by the other policies before referred to.

It will be seen from this statement, that the case presents two principle questions; the first upon the construction and effect of the policy on which the claim is founded; the second upon the effect of the sale to Harbison & Hansboro. Upon each of these questions, so far as extraneous facts might be applicable, there was a contest, and evidence was adduced by the parties; and the chancellor having decided the question upon the construction of the policy in favor of the plaintiffs, and that upon the effect of the sale to Harbison & Hansboro in favor of the defend-

ants, and having decided against the latter, a sum ascertained on this basis, the defendants by their appeal, and the plaintiffs by cross errors complain—the former that the decree is for too great, and the latter that it is for too small a sum.

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In reference to the first of these questions, it is proved that at all of the pork-houses in Louisville, and the adjacent cities of New Albany and Jeffersonville, eleven in number, and of which eight are in Louisville, it is a large part of the regular business of the establishment to receive the hogs of other persons, to be slaughtered, cut up, packed or smoked, or otherwise disposed of, as may be directed or agreed on; and that a large, often, perhaps, the largest part of the meat contained in the pork-house belongs to other persons than the owners of the pork-house; and the evidence authorizes the assumption that in Louisville the term pork-house is understood to denote an establishment in which the slaughtering of hogs, belonging to various owners, and the preparation of the pork, and lard or bacon to be made from them, is carried on, and the custody and care of the whole is undertaken; and that the stock of a pork-house is understood as including the hogs and meat of the various owners placed and contained in it, as well as the instruments and materials necessary for carrying on the business in its various stages. The terms used in the policy to describe the different subjects of the insurance, are comprehensive enough to embrace all the subjects of the kind mentioned which might be contained in the pork packing, lard, and smoke-houses of the plaintiffs. And, although, if there were nothing to indicate a contrary intention, the insurance might, under the third condition attached to the policy, be restricted to such of the articles described as properly belonging to the insured themselves; yet as the words "and all other articles comprising the stock of a pork-house," refer grammatically and properly not only to salt, barrels, and kegs, but also to all of the articles previously enumerated,

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(as pork, lard, &c., &c.) there would seem to be clear indication of intention to embrace in the description everything constituting the stock of a pork-house, which might be contained in the packing, lard, and smoke-houses referred to.

It is proved that persons sending their hogs to the pork-house of Jackson, Owsley & Co., to be slaughtered, &c., generally directed insurance to be made; that all the property in the establishment was considered to be at the risk of the plaintiffs; that they generally made advances on, and had charges against it; that it was their object to keep it all insured, as is usual among those engaged in the same business, and that their clerk, who obtained this policy, intended to get insurance applicable to the property of others, as well as that of the plaintiffs, and so understood his own application and the policy issued by the defendants.

1. An agent or consignee, having the property of his principal in his possession, and responsible for it, may, and especially if he have an interest in it, though it be only for his commissions, insure it in his own name, and in case of loss recover its full value—holding all beyond his own interest in trust for the owners of the property. (*Story on Agency*, section 111; *Hewitt, Allison & Co. vs. Franklin Insurance Company*, 3 B. Mon., 231; 1 Hall, 189.)

It seems to be the established law, that an agent or consignee, having the property of his principals in his possession, and responsible for it, may, and especially if he have an interest in it, though it be only for his commissions, insure it in his own name, and in case of loss recover its full value, holding all beyond his own interest in trust for the owners of the property. (*Story on Agency*, section 111; *Hewitt, Allison & Co., vs. Franklin Insurance Company*, 3 B. Mon., 231; *DeForest vs. Fulton Ins. Co.*, 1 Hall, 84.)

This principle is recognized by the third condition of the policy before us, which is relied on to exclude from the insurance all the property in the pork-house establishment, except that which properly belonged to the plaintiffs themselves. And the question is, what form of expression should be deemed sufficient to comply with the requisition that goods held in trust or on commission must be insured as such, or will not be embraced in the policy? A general answer to this question is, that as the language of the policy in all its parts is framed by the insurer, and not by the insured, it is the duty of the former, when

fully apprised of the subject intended and expected to be insured, so to frame the policy as to cover the intended subject, and to furnish the expected indemnity against loss upon that subject. And if the description given by the applicant, though sufficient by its comprehensiveness to cover all the property of the kind, and in the situation described, and which it may be his right and interest to insure, may yet, by the usage of insurance, or by the effect of a condition annexed to the policy, be subject, for want of particular words, to a restriction by which a portion of the property may be excluded; good faith requires that the insurer shall apprise the applicant of the ambiguity or other defect, or by enquiry ascertain his real intention. The insurer has printed policies encumbered with numerous and complicated provisos and conditions, and is presumed not only to understand their meaning, but to know their intended effect upon the forms of expression to be used in the policy, and upon the consequent rights of the parties. The insured, unfamiliar with these particulars, if not wholly ignorant of them, relies upon the written terms of insurance adopted for the actual case, and confides, as he has a right to do, in the skill and good faith of the insurer, for making the insurance effectual under the conditions of the policy to cover the subjects known to be intended. And although the insured by accepting the policy takes it with the description, provisos, and conditions, which form a part of it, yet if he has himself acted in good faith, the considerations just adverted to require that the terms of the policy, both written and printed, should be construed liberally for his benefit, and so as to effectuate, as far as may reasonably be done, the indemnity which he justly expected.

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Upon the question above stated, as to the form of expression necessary to effect an insurance upon goods held in trust or on consignment, several witnesses who had been engaged in the business of making insurance and issuing policies in Louisville,

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as agents for different insurance companies, were examined on each side. Several testified, on the part of the plaintiffs, to the effect that the description of property insured, as constituting the stock of a pork-house, was sufficient to embrace the property constituting such stock, though it belonged to various persons; and that the additional words "or whom it may concern" were, in their opinion, immaterial, and gave no additional or different effect to the policy. Several witnesses for the defendant considered those words as material, and were of opinion that without these or other words indicating the ownership of others besides the insured, the policy would not embrace the property of others. Even these witnesses considered that the additional words "or whom it may concern," would suffice to extend the insurance to property held in trust or on consignment, at least in an insurance on stock of a pork-house; and we understand it to be proved that any of the insurers would insert these words simply upon request at the time of making up the policy, and without increase of the premiums; and that upon the policies executed to Jackson, Owsley & Co., not containing those words, all except two had been settled according to the claim of the plaintiffs in this case.

This evidence does not, it is true, establish a uniform custom or usage in Louisville, for the adjustment of loss upon policies such as that now in question, nor even a uniform practice in adapting the terms of the policy to the protection of the different owners of property under the care and custody of the proprietors of a pork-house; but it shows that while some, perhaps a majority, would deem it sufficient for this purpose to describe the property as constituting the stock of a pork-house; others, who would deem it necessary to say nothing more, would still be content with the additional words "or whom it may concern," following the name of the insured, and would themselves use these words as sufficient to include in the indemnity the property of the vari-

ous owners. None of them intimate that they would deem it necessary to use more than these latter words for the purpose. And as these words, which indicate 'nothing more than that other persons besides those specially named as the insured, are or may be interested in the subject, and may be entitled to the benefit of the promised indemnity, would be used by the strictest constructionists among the insurers themselves, as a sufficient compliance with the requisition of the third condition of the policy; any other words or phrase, importing the same thing, must, in reason, be deemed equally a compliance with the same requisition.

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The policy itself shows that pork, lard, &c., and the other articles enumerated in it, do compose a part of the stock of a pork-house; the enumeration and description are sufficient to embrace all articles of the kind referred to, whether belonging to the owners of the pork-house or to others, and do embrace all unless restricted by the third condition. But as the term 'pork-house,' as understood in Louisville, designates an establishment and a business, in which hogs of various owners are slaughtered and undergo various operations by which they are prepared for market; and as the stock of a pork-house, being composed of the same articles, in their various forms, includes the property of various owners, and as the phrase itself carries with it the idea of this various ownership, and clearly denotes it, we think the enumeration of the various articles which might compose the stock of a pork-house, with the additional characteristic that they do compose the stock of a pork-house belonging to the plaintiffs, denotes sufficiently, and as certainly as the words "or whom it may concern," that others besides the insured themselves are interested in the property, and are intended to have the benefit of the insurance to the extent of their interests, and should therefore be deemed a compliance with the third condition.

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If it were admitted that the application to insure in the names of Jackson, Owsley & Co., pork, lard, &c., and all other articles composing the stock of a pork-house, contained in the buildings described, did not indicate unequivocally the desire to insure the entire stock of the pork-house to whomsoever the articles composing it might belong, it might well have been deemed sufficient for that purpose by the applicant, as it would have been, and in fact was so deemed by several insurers in Louisville. And with such knowledge of the business and usages of a pork-house as every insurer there must be presumed to have had, the application in these terms was at least sufficient to apprise any one applied to for insurance, that it was probably, if not certainly, the design of the applicant to obtain insurance upon the entire stock, though the articles composing it might belong to different owners. If, according to the opinions and practice or usage of the particular insurer to whom the application was made, a further specification of this intention were deemed necessary, good faith, as we have already said, required that he should have so informed the applicant, or that he should, by inquiry, (as one of the witnesses says would be proper,) have turned his attention to what was deemed an ambiguity, and have thus ascertained what he intended; having failed to do so, and having drawn up for an applicant who, as indicated by the terms of the application, intended to describe, and desired to insure the entire stock, a policy, which presenting the same ambiguity, (if it be one,) will be effectual or ineffectual for the purpose intended; as it may be construed in favor of one or the other parties, common justice requires that the consequences of the failure should fall upon the party who, under the circumstances, might and should have removed the ambiguity; and an applicant for insurance having indicated, with reasonable certainty, the extent of the insurance desired, should not, after a loss has occurred, be disappointed in his just expectation of in-

demnity by an objection of which the insurer was apprised when the policy was issued, while its existence and effects may, for all that appears, have been unknown to the party insured.

But the objection is not in any view sustainable. The object of the third condition of the policy, as shown by the practice of insurers at Louisville, is accomplished by any sufficient indication in the policy that the property described, to whomsoever belonging, is intended to be insured. And upon the evidence respecting the nature and business of a pork-house in Louisville, we are of opinion that the description of the subjects insured, as all being the articles constituting the stock of a pork-house, and contained in the buildings described, which are evidently appurtenant to the pork-house, is a reasonably certain indication that all articles of the kind mentioned and situated or contained in the buildings described, are, without regard to the actual or peculiar ownership of each or any of them intended to be insured. The hogs and meat in the establishment, and the ownership of them, would of course vary from time to time. At particular periods Jackson, Owsley & Co., the proprietors of the pork-house, might own none or but a small portion of the hogs or meat in it, but all being at their risk they had the strongest motives of duty and interest to keep it insured. And this fact, growing out of the nature of the business, tends strongly to prove not only that the plaintiffs intended to cover all by insurance, but that this intention was known to the insurers.

We are of opinion, therefore, that the first of the two questions stated was properly decided by the chancellor, and that the loss upon the articles constituting the stock of the pork-house should be borne ratably by all the insurers, although the articles did not all belong to Jackson, Owsley & Co., and although the policies do not all contain the words "or whom it may concern."

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3. A policy insuring all the articles constituting the stock of a pork-house, and all articles contained within the building described and appurtenant thereto, covers all within those buildings, without regard to the particular ownership of each or any article which was at the risk of the insured.

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Upon the second question, which relates to the sale to Harbison & Hansboro, and its proper effect in this case, it is to be remarked, that although in strictness a sale imports a complete and executed contract, by which the title and possession, or right of possession are transferred from the vendor to the vendee, the term itself is often applied to transactions in which the transfer is not thus comprehensive and complete, and in which the contract, in some respects, seems to be executory. The criterion established for determining whether, in a particular case, the property has passed by the sale so as to be thenceforth at the risk of the vendee, refers of course to the particular facts which characterize the transaction. The facts in the present case are substantially the following: In February, 1853, some two or three weeks before the fire occurred, Harbison & Hansboro purchased from Jackson, Owsley & Co., 40,000 green or bulk shoulders of pork, on the terms that they were to be paid for in cash on delivery. On the same day of the purchase the vendors ascertained that they had not that number of shoulders in the condition called for by the contract, but having shoulders which had been hung up and were being smoked, it was agreed that the deficiency should be made up in shoulders of this latter description. The shoulders, all of which were in the pork-house buildings, were to be weighed by the vendors, and were to be sound and merchantable. The vendees were to employ an inspector to inspect them. The shoulders appear to have been weighed and inspected some ten or fifteen days before the fire. But it does not appear that either of the vendees, of whom both resided at the distance of about thirty miles, were at the pork-house, either at the time of the weighing or afterwards, before the fire, to receive and pay for the shoulders, though one of them had gone to Louisville to see about it, and while there, probable about the time of the weighing, had advanced, by way of accommodation, and not of obligation, \$17,000 to the

vendors; which sum did not equal one-half of the entire price to be paid. A very large proportion of the green shoulders was destroyed by the fire. The residue, together with those which were smoked, were afterwards delivered, and the price of those delivered amounting to about \$3,000 in addition to the \$17,000 previously advanced, was then paid.—The clerk of the vendors state that it was the general usage on such sales to make out an invoice, on the delivery of which to the vendees, the price was to be paid; that the meat until paid for was considered to be the property, and at the risk of the vendors, and we infer from the evidence that the parties understood that it was to be kept under insurance by the vendors. The invoice was made out on the meat being weighed, or as it was weighed sometime before the fire, but had not been delivered to the vendees, nor had any payment been made by them beyond the advance of \$17,000 as before stated. The plaintiffs made no claim upon the vendees for the shoulders which were burnt, but look to the insurance upon the stock in the pork-house for indemnity.

The first question upon this evidence is whether the vendors had, on their part, done all that was to have been done preparatory to the final execution of the contract, and before the vendees were bound to pay for the articles purchased, since no invoice was ever delivered, and it does not appear that the inspector of the vendors had anything to do with the weighing or counting of the pieces or took any notice of either. Nor, indeed, is there any distinct and precise proof of the price per pound agreed to be paid, nor of the allowance to be made in taking the smoked instead of the green shoulders. If these matters remained to be adjusted before the aggregate sum to be paid could be certainly determined, it would seem that the articles sold did not, according to the general rule applicable to the ordinary sales of goods, for cash, to be paid for on delivery, become the property of the vendees, and at their risk,

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before a large portion of them was destroyed by fire. And even if the matters just referred to were so agreed on in the contract that nothing remained to be done for their final ascertainment after the articles were counted, weighed, and inspected, it would be just and would seem to be requisite, that before the vendees should be involved in the hazard consequent upon ownership, they should be apprized of the facts necessary to be known before they could, by making payment, be entitled to assume the authority and control pertaining to ownership. This knowledge, according to the usage of the vendors in such sales, and the understanding of the parties in this particular case, was to be communicated by delivery of the invoice. And although the vendees might, at any time after the weighing, &c., was completed, which would necessarily take several days, have demanded the invoice, and upon that or such other knowledge as they had, might have offered payment and demanded or taken the goods, (as the vendors might on their part have delivered the invoice and demanded payment,) the delay of each party to exercise these rights important to each, if the ownership and risk were already devolved on the vendees, who had failed to insure, tends strongly to prove in corroboration of the statement of the witness, that it was the understanding and intention of the parties that the ownership and risk were to remain, and did remain, with the vendors, and under the protection of their insurance until payment or delivery. If, as we may think may be assumed, as fairly deducible from the facts, such was the intent of the contract, there is no doubt that such intention, whether expressed in words or implied from its nature and the attendant circumstances, would give character to the transaction and determine the rights of the parties. And there is as little doubt that the insurers, setting up this contract between the insured and others to protect themselves from loss, upon the very articles insured, occurring during the very period of their in-

insurance, must abide by the nature and effect of that contract as between the parties, to be determined upon the evidence in the case against the insurers.

There is no rule of law more universal or more inflexible than that contracts are to be effectuated according to the lawful intention of the parties. There is none more certain than that the parties themselves may determine by their contract, whether on a sale of property for cash on delivery, the title and ownership shall pass immediately on the making of the contract, or on the identification of the articles sold and the price, or not until payment or delivery. The contract in this case being in parol, is more open than if it had been in writing to implications, and to the proof of facts and circumstances, for ascertaining its terms and effect; and certainly there is no principle, either of reason or of law, which requires that in the present contest with the insurers there should be a different rule, either of evidence or of construction, from that which would prevail between the parties themselves. The insurers put their case and the question upon the right of the parties under the contract, and they must abide by those rights as they existed, and would be determined between the parties.

Then notwithstanding this nominal sale to Harbison & Hansboro, the plaintiffs, according to the view of the facts and law just presented, had not only the possession and the right of possession, but the property or ownership itself, in substantially the same plight as before, except that their obligation to deliver the articles to these purchasers on payment of the price, restricted them from selling the same articles to others. And as their interest in the safety of the property was equivalent to the entire price, (for under the view now taken, they were bound to account for the \$17,000, and would lose the entire benefit of the sale, in case of non-delivery, unless they could show a default on the part of the vendees,) there seems to be no reason, according to the gen-

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4. Contracts are to be construed according to the intention of the parties thereto. A contract to sell 40,000 hams, to be paid for on delivery; the hams were inspected and invoiced, but not delivered or paid for: held that the contract was executory, and property not changed, and if insured protected by the policy. (*Philips on Insurance*, 1st vol., 27; 4 *Massachusetts Reports*, 336.),

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eral law of insurance, why they should not recover for the loss of the articles counted and weighed under the contract, just as if the contract had not been made; nor is their right thus to recover affected, as we think, by the fourth condition of the policy, declaring that a transfer or change of title in the property insured shall avoid the insurance upon it. The only legitimate or supposable object of that clause is to prevent the continuance of the insurance, and the liability of the insurers, after the property ceases to be at the risk of the insured, when it would in effect be but a wagering policy. And notwithstanding the vagueness of the expression, "any change of title," it would be understood by common men, and should be construed with reference to its object, as meaning such transfer or change of title from one to another, as would terminate the interest and risk of the insured in the property transferred.

5. A vendor of personal property, to be paid for on delivery, parts not with the title until payment; if the price is not paid in a reasonable time he may resume his original ownership, as upon a rescission of the contract. (*Story on Contracts*, sec. 809; *Chitty on Contracts*, 427, and authorities there cited.)

But if the preceding view, with regard to the nature and effect of the contract, for the sale of 40,000 shoulders to Harbison & Hansboro be incorrect, if the right of property passed to them as soon as the shoulders were identified by counting and weighing them, the vendees were of course then bound to make payment, and the vendors had still not only the right to retain the possession until payment, but had also the farther right if payment should not be made in reasonable time, and especially after notice, to sell the same articles to another at the risk of the vendees, or to resume their own absolute dominion, as upon a rescission or abandonment of the contract. (*Story on Contracts*, sections 809, 812; *Chitty on Contracts*, 427, and cases cited by both authors.) If these rights, which seem to be more than a mere lien, amounting in fact to nothing more, the lien did not like the right of the vendees to demand, and the obligation of the vendors to deliver possession in payment of the price, grow out of the contract which conferred upon the vendors no other right but that of demanding payment. It grew out of their origi-

nal ownership and dominion, and was a remnant of their original possession and property, or interest, precisely equal in value to the unpaid price to become due on delivery. And as this lien was retained as the chosen security, its value as property or as an interest in property is wholly independent of the solvency or insolvency of the debtor, and is precisely measured by the sum due, and the adequacy of the lien to secure it. The insolvency of the debtor would, it is true, render more apparent the importance of the lien as being the only security, but would not affect its intrinsic value, nor the creditors right to look to it for securing payment.

If no part of the price be paid this lien of the vendor, which is an interest or property in the articles sold, but retained in possession for securing payment, is upon the presumption that the agreed price is the fair value, to be regarded as equivalent in value to the articles themselves, and to the absolute ownership of them, except that although it may be depreciated it cannot be enhanced by the fluctuations of the market; and as the vendor, whether the vendee be solvent or insolvent, has a right to look to the goods and his lien upon them for securing payment, and is not bound to resort to the personal responsibility of the vendee, so if his lien or interest in the articles sold be protected by insurance, that insurance being, in case of a destruction of the goods, and consequently of the lien, by a casualty insured against, substituted by the very nature and effect of the transaction, to the extent of the interest insured, in place of the goods themselves, he must have the same right to look to it, instead of resorting to the personal responsibility of the vendee, as he would have had to look to the goods themselves had they remained.

That the interest of the vendors, as above stated, was a proper subject of insurance, is not denied; and if they had insured that interest specifically, after the contract with Harbison & Hansboro, we suppose the consequence, as above stated, would be

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6. A vendor of goods not delivered, but to be paid for on delivery, has a lien on the property retained in possession for securing payment, and it is upon the presumption that the agreed price is the fair value, and cannot be enhanced by any fluctuation in the value; and if the goods be insured the vendor is entitled to the insurance corresponding with interest insured. Any interest remaining in a vendor, who has made a contract of sale, remains protected under an existing insurance.-- (*Mass Reports* 516; 5 *Pick.*, 76; 19 *Ib.*, 81; *Am. Lead. Cases*, in note to the case in 8 *Mass. Reports*.)

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alike unquestioned. But it is contended that without such subsequent and specific insurance the vendors, notwithstanding the previous insurance upon the same articles as their property, have no recourse upon the policy on account of the impairment or destruction of their lien by a casualty insured against, and that having lost their lien by the destruction of the goods, they have no other resource for payment but in the personal responsibility of the vendees, whose insolvency would subject them to precisely the same loss, and upon precisely the same subject, as if there had been no sale. And this consequence is insisted on in a case in which the very terms of the contract indicate clearly that there was no substantial transfer or change of the title, and that the vendors retaining, and entitled to retain, the goods as a security for the price, retain an interest in them equal to their value, and when the vendees at most acquire but a nominal title, unaccompanied by possession, or the right of possession, arising not from any positive act or intention of the parties having that object directly in view, but by mere operation of law, and encumbered by an interest of the vendors equivalent to the value of the subject, and clothed with the possession and the right of possession.

Waiving the objection founded on the inconvenience of requiring, and especially in the business of a pork-house, a new insurance after every transaction by which the title to property remaining in the establishment may be immediately or ultimately affected, and waiving also the considerations which tend to show that the parties to this sale did not intend that the right of property should pass until payment of the price, but intended and expected it to remain as the property of the vendors, subject to the insurance already on it, we are of opinion that under the general law of insurance the interest remaining in the vendors after the sale, though not the same as that which existed before, was still protected by the previous policy, unless excluded from pro-

tection by the terms of that instrument; and that the fourth condition of the policy does not apply to a case in which, although there was in name a sale, there was in fact neither an absolute transfer of property or change of title, nor a substantial transfer or change of interest.

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Upon the first branch of this proposition the authorities are abundant and decisive. Phillips, in his treatise on insurance, (*volume 1, page 27,*) says it has been held "that the sale and conveyance in fee of a 'house insured, which the purchaser at the same 'time mortgages back to the vendor, did not divest 'the assured of his interest under the policy.'" In the case to which he refers (*Stetson vs. Mass. Mutual Insurance Co.*, 4 *Mass. Reports*, 336,) the plaintiff, after the issuing of the policy, sold and conveyed a part of the building insured, reserving to himself a term of seven years in the premises, and the grantee at the same time reconveyed them to the grantor, in mortgage, to secure the purchase money; it was objected that by the act of incorporation, and by the very nature of a mutual insurance company, the members of the company must be the owners of buildings—it was in virtue only of those buildings being insured that the owners can become members of the company. The objection seems to have been considered by the court principally with reference to the principal of policy which prohibits gambling insurances, insurances without interest. The objection was overruled by a majority of the court, as not being supported by showing contracts affecting the formal title of the plaintiff, in part only of the subject of the insurance. And it is said in the opinion "his interest in a part remains the same, and perhaps substantially, and for the purpose of repelling this objection, is to be considered as unaltered in the whole of the premises insured. It had been before said, that taking the writings together, the transaction might be considered as a conditional sale after the expiration of seven years.

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In *Carroll, &c., vs. Boston M. Ins. Co.*, 8 Mass. R., 516, the principle seems to be recognized that if any interest remain in the insured at the time of the loss it is sufficient, and that if a conveyance made after the insurance, which was in fact absolute, had been a mortgage, there would still have been an interest on which there might have been a recovery. This principle is more distinctly stated in the case of *Lazarus vs. Commonwealth Insurance Company*, in which several cases in the Supreme Court of Massachusetts are referred to as sustaining it. (5 Pick. 76.) And in the same case again reported, (after a second trial,) in 18th Pick. 81, the principle was discussed and decided, that notwithstanding a conveyance, (after the insurance,) if it be in the nature of a mortgage or in trust, with a resulting trust to the insured, so that he has in truth an insurable interest in the property, he may nevertheless recover to the extent of his actual loss. The transfer of the vessel insured with other property, was in trust to pay over the proceeds to certain creditors of the plaintiff, who would of course be entitled to the surplus if any. A new trial was granted because a verdict had been found for the plaintiff, when there was no evidence of a probable surplus after payment of the debts. On the subsequent trial it was proved that the debts had been paid, and on the ground that the transfer was not absolute, and the insurable interest only conditionally affected by it, and that it left the plaintiff entitled to the surplus, the verdict for him was sustained, and he had judgment accordingly.

In the *second volume of American Leading Cases*, 435, in a note to the case of the *Boston Mutual Insurance Company*, before cited from 8th Massachusetts Reports, it is said to be universally admitted that a sale or assignment of the property will only defeat the recovery of the assignor on the policy, when and so far as it strips him of insurable interest, without regard to whether the interest which survives the conveyance be of the same nature or character as that which ex-

isted before the conveyance was made, to which the author adds: "It is consequently well settled that a vendor either of real or personal property, who has retained the legal title as a security for the purchase money, may recover for a loss which has happened subsequently to the execution of the contract of sale," and a number of cases decided by different courts are referred to. These cases, with few exceptions, we have not had an opportunity of examining. But the principle last stated is directly sustained by the case cited above from *4th Massachusetts Reports*, and the principle first stated is sustained by all of the above cited cases, to which others might be added.

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The cases, and especially the cases in *4 Mass. R.*, and that in *5th* and *19th Pick.*, have also a bearing upon the construction of the fourth condition of the policy now in question, which being supposed to have been founded upon some just principle, and to have been intended for the attainment of some substantial object, and as a security to the insurer against unfair claims rather than as a protection against such as are just and equitable, we are of opinion that it does not apply to such contracts or transactions as affect merely the formal title of the assured, leaving in him an insurable interest of substantial value in the subject or a part of it, and especially where that interest is equivalent in value to that which existed before, and is only distinguishable from it by subtil and nice discrimination, or by artificial rules of construction.

Being of opinion, therefore, that under any view of the effect of the sale to Harbison & Hansboro, and of the transactions relating to it, the policy covered the interest of the plaintiffs in the articles sold, so long as they remained in the pork-house unpaid for, and not actually delivered; and being further satisfied that this interest of the plaintiffs was equal in value to the whole of said articles which were consumed by the fire, we conclude that the various insurers being, as now appears, responsible for the entire loss, the

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defendants are responsible for one-twelfth part thereof.

Wherefore, the judgment upon the original errors assigned by the defendants is affirmed, but upon the cross errors of the plaintiffs it is reversed, and the cause is remanded, with directions to render a judgment in favor of the plaintiffs for one-twelfth part of the entire loss, including that occasioned by the destruction of a part of the shoulders sold to Harbison & Hansboro.

Case 20.

Spurrier's heirs vs. Parker, &c.

PET. EQ.

APPEAL FROM LOUISVILLE CHANCERY COURT.

1. "I do hereby set free from bondage the following negroes purchased by me of J. C., viz: negro woman Rose, on the 25th day of July, 1802, &c., also the negro girl Poll, which I purchased at Colonel Chew's sale of negroes, who is aged about nine years and six months, on the 25th day of January, 1814." Held that Poll was not free until the 25th day of January, 1814, and that her issue born before the last named day were slaves.
2. Deeds should be construed by considering all the parts thereof, and see that they harmonize.
3. It is not proper to resort to extraneous facts and surrounding circumstances in the construction of writings, where the language is susceptible of a clear solution.

The facts of the case are stated in the opinion of the court. *Rep.*

Riley & Muir and Hamilton Pope for appellants—

Argued—1. That the negro girl Poll, named in the deed of Peaco, of 3d August, 1798, was not free until the 25th day of January, 1814, and that her issue, born before that day, are slaves. Such is the law as decided by this court in the case of *Ned, &c. vs. Beall*, 2 *Bibb*, 298; *Jamison vs. Emilia*, 5 *Dana*, 207;

Esther, &c. vs. Askin's heirs, 3 B. Monroe, 60. The children follow the condition of the mother, as repeatedly decided by this court, and reiterated in the case of *Johnson's admrs. vs. Johnson's heirs*, 8 B. Monroe.

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The case of *Hudgens vs. Spencer*, 4 Dana, 569, relied on, was decided by this court more upon the strong terms used by the testator, of his intention to give immediate freedom, and to retain control for service only, than upon the literal construction of the deed. Upon the same principle was the case of *Charles vs. French* decided, (6 J. J. Marshall, 331.) There is no such emphatic terms of abhorrence to slavery employed by Peaco in the deeds in this case. These two cases are not analagous to the present.

The case of *O'Bryan vs. Goslee*, 10 B. Monroe, is not like this. There immediate freedom was given in express terms, "I give and bequeath all my negroes immediate freedom, &c." Such is not the language of Peaco in the deed under which freedom is claimed in this case.

In the case of *Fanny vs. Bryant*, 4 J. J. Marshall, 303, Julia and her *increase* was to be free on the first of July, 1816. The *increase* was expressly embraced by the instrument, and consequently were free when the mother became free.

Peaco did not regard the issue of Poll, born before 1814, as free—he sold one of that issue:

2. It is insisted that there is no ambiguity on the face of the deed, and that a resort to extraneous facts is not necessary to aid in the construction of the deed.

B. Ballard for appellees—

Contended that they were the children and grandchildren of the negro woman Poll, and descendants of Lucretia, the daughter of Poll, and though born before the 25th day of January, 1814, are entitled to freedom.

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Peaco intended, by the deed of 1798, to give all the persons named in that deed immediate emancipation, reserving to himself their services until the prescribed period—at least he intended the issue of the females to be free at the prescribed period, as well as their mothers.

According to both reason and authority the increase may be emancipated without the emancipation of the mother. The maxim, *partus sequitur ventrem*, literally means that the issue of a female *prima facie* follows her condition. If we were untrammelled by judicial decisions, both reason and a literal application of this maxim would concur to establish not only that the issue of a female slave for life is also *prima facie* a slave for life, but that the issue of a slave, who is to be free at a future period, follows the condition of the mother, and becomes free at the same period.

A female that is to be free at a future period is not, in the full sense, a slave. She may, upon her own motion, require probate of a will, by which she is to acquire freedom. (*Bodine's Will Case*, 4 *Dana*, 476.) She may, by suit, prevent her forcible abduction from the state. She is in fact vested with rights—a *present* right—to the future enjoyment of freedom. To hold the child of a slave, invested with these rights, as a slave for life, does not apply the maxim, but is really disregarding it.

This application of the doctrine is in violation of of the analogies of the law. If one by his deed declares that his slave shall be free at the end of twenty years, he, in effect, creates for himself a particular estate, and gives up the remainder to the slave; and as by one law, and by the direct application of the maxim, *partus sequitur ventrem*, the remainder takes the increase of the slaves during the term, no good reason is supposed to exist why the issue of Poll should not have become free when she did. The maxim has been misapplied, and should not be followed except in cases precisely analogous. (*Harris*

vs. *Clarissa; Pleasants vs. Pleasants*, 1 *Call*, 388; 1 *Cox's Reports*, 336; *Scott vs. Waugh*, 15 *Sargeant & Raule*, 17.)

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The intention of the grantor is to be sought in the construction of the instrument. That was the rule adhered to in *Hudgens vs. Spencer*, 4 *Dana*, 592. The Court say: "It appears that the grantor intended to emancipate all his slaves, and it is inconsistent with that object, as well as with his severe denunciation of slavery, to give such interpretation to his deed as that which would doom to slavery an unborn offspring of those infant females who might and did bear children between the date of the deed and the period when they were to 'go out,' but such would be the lot of those children if their mothers were slaves after the execution of the deed; and therefore, as such an intention cannot be ascribed to the benevolent grantor, we should interpret the deed as to entitle all alike to freedom, if it can be done without doing violence to any part of it."

Whether Peaco emancipated all his slaves does not certainly appear. The inference is that he did. But if the sentence above quoted means anything, and its meaning is not ambiguous, it means that if a man declare that all his slaves shall be free at a prescribed period, he must be understood *prima facie* to intend that the issue born after the period prescribed shall be free likewise.

The case of *O'Bryan vs. Goslee*, 10 *B. Monroe*, 100, sustains this view.

The conclusion from the facts of the case is manifest that Peaco was prompted by benevolence, and a belief in the sinfulness of slavery, and opposition to it. One at least was purchased for the purpose of her emancipation, and several, if not all, shortly before.

The deeds of emancipation in the case of *Charles vs. French*, and *Hudgens vs. Spencer*, *supra*, contain expressions disapproving slavery. In the case of *Isaac vs. West*, and *O'Bryant vs. Goslee*, they do not.

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If the motive sufficiently appear, either from the nature of the act, or from undisputed evidence *dehors* the deed, why should it not be equally respected? The recital in a deed is not looked to in giving it a construction, unless it be otherwise doubtful; they perform the same office in aiding in the construction as the situation of the parties—the surrounding circumstances.

A proper construction of the deed gives to Poll immediate freedom, to be enjoyed after the 25th January, 1814. Omitting all that is foreign to the present inquiry, each clause of the deed will read as follows: 1. I hereby set free from bondage Poll, on the 25th day of January, 1814. 2. I release unto Poll all my right and claim whatever to her person, or to anything that she may acquire, after the 25th day of January, 1814. 3. And hereby declaring Poll free without any interruption from me, or any person claiming under me. By the first clause Poll is made free on the 25th day of January, 1814, and by the last she is made free immediately. Why should the words "25th January, 1814," be added to the last clause rather than leave it out of the first? It does not comport so well with the benevolent object of the grantor. No rule of construction will authorize the striking out words in one sentence of an instrument and inserting them in another; and there is no necessity for a resort to this extraordinary process in the construction of the deed in this case. The whole deed is made to harmonize by construing it as giving immediate freedom to Poll, and postponing its enjoyment until the 25th January, 1814.

The case of *Isaac vs. West*, 6 *Randolph*, 652, cited before, is analogous to this. It rarely happens that a case so nearly alike can be found to aid in the construction of an instrument, and it fully sustains the chancellor.

Judge ORMSHAW delivered the opinion of the Court.

Emily Parker and others, persons of color, brought this suit for freedom, and base their rights thereto upon the following instrument:

"I, Samuel Peaco, of the city of Annapolis, in Anne Arundel county, in the state of Maryland, do hereby set free from bondage the following negroes, purchased by me of John Callahan and Mary Mann, viz: negro woman Rose, on the 25th day of July, 1802; negro girl Kitty, on the 25th day of July, 1817, and negro girl Harriet, on the 25th day of July, 1825; also the negro girl Poll, which I purchased at Col. Chew's sale of negroes, who is aged about nine years and six months, on the 25th day of January, 1814, and likewise the negro woman named Rose, that I bought of Eleanor Davidson, executrix of John Davidson, this present day; and I do, for myself, my executors, and administrators, release unto the negroes aforesaid, all my right and claim whatsoever as to their persons, or to any estate they may acquire after the dates to each person respectively affixed as aforesaid, and hereby declaring the above mentioned negroes absolutely free, without any interruption from me or any person claiming under me." This instrument is signed by Peaco, and is dated the third day of August, 1798.

The plaintiffs are descendants of the girl Poll, mentioned in the foregoing deed, and are children and grand-children of Lucretia, who was a daughter of Poll, and was born about the year 1807, before the 25th day of January, 1814, at which time Poll, by virtue of the deed, was no longer to be subject to service at the command of another.

The only question is, whether by the terms of the deed Poll was immediately set free, with a postponement of the enjoyment of her freedom till the 25th day of January, 1814, or whether freedom attached to her at all before that time. If, by the deed, she was immediately emancipated with a postponement of its enjoyment merely, then Lucretia, who was

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1. "I do hereby set free from bondage the following negroes purchased by me of J. C., viz: negro woman Rose, on the 25th day of July 1802, &c.; also the negro girl

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Poll which I purchased at Col. Chew's sale of negroes, who is aged about 9 years and 6 months, on the 25th day of January, 1814:" Held, that Poll was not free until the 25th day of January, 1814, and that her issue born before the last named day were slaves.

born after the date of the deed, was free, notwithstanding her birth took place before the 25th day of January, 1814, and her descendants, the plaintiffs, according to the maxim, *partus sequitur ventrem*, would also be free.

But we apprehend the deed is not reasonably susceptible of such a construction. The substance of the deed in reference to Poll will read thus: "I, Samuel Peaco, do hereby set free, on the 25th day of January, 1814, the following negro girl Poll, aged about nine years and six month, and I do, for myself, my executors, and administrators, release unto said negro girl all my right and claim whatsoever as to her person, or to any estate which she may acquire *after the date aforesaid*; and hereby declaring the above mentioned negro absolutely free, without any interruption from me or any person claiming under me."

If the deed be considered apart from its last clause, no multiplication of words can make it plainer than the language of the deed itself, that Poll was not emancipated till the 25th day of January, 1814, and that the right and claim of the grantor to the person and estate of Poll, acquired before that period, was not surrendered. In other words, we think this language of the deed does not import emancipation *in presenti*, to be enjoyed *in futuro*, but imports emancipation on the 25th day of January, 1814, and not before.

2. Deeds should be construed by considering all the parts thereof, and see that they harmonize.

This construction we think is not at all impaired or altered by the last clause of the deed, which reads: "And hereby declaring the above mentioned negro absolutely free, without any interruption from me or any person claiming under me." The deed must be construed as a whole; all its parts are to be considered and made to harmonize and consist, if practicable, and there is no difficulty, in our opinion, in making this clause consistent and harmonious with the entire preceding parts of the deed. The latter clause is a continuation of the sentence in which it

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is declared substantially that the right and claim of the grantor to the person and acquisitions of Poll, are not released to her until the 25th day of January, 1814. The first branch of the sentence is not inconsistent, but in harmony with the granting part of the deed, in which it is declared that Poll shall be free on the 25th day of January, 1814, and if the last clause is made to consist with the first branch of the sentence, then all the different clauses are made to consist together and to harmonize, and not otherwise. Unless this clause can be made to harmonize with the preceding clauses of the deed, then, indeed, the only effect to be given to it is that Poll was absolutely free, *instantly*, without any right remaining in the grantor to control her services even till the 25th day of January, 1814. To give the deed such effect, would be suicidal and at war clearly with the intention of the grantor. To make the last clause consistent with the other clauses of the deed, it is only necessary to supply the words designating the time of freedom, which were employed in the preceding part of the deed, which words are: "On the 25th day of January, 1814." The last clause would then read: "And hereby declaring the above mentioned negro absolutely free on the 25th day of January, 1814, without any interruption from me or any person claiming under me." Thus the after clauses are made to harmonize with the first clause of the deed, giving freedom to Poll on the 25th day of January, 1814.

The language of this deed, except the expression of the motives of the grantor, and his sentiments in regard to slavery, is not dissimilar to that employed in the deed of Baker, which was discussed and construed by this court in the case of *Hudgens vs. Spencer*, 4 Dana, 589. And in that case the court say that the literal import of the deed, considered without any regard to the subject matter, or the declared motives of the grantor, may be deemed to be that the beneficiaries were not to be free persons until the respective pe-

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riods for their going out. The emancipating words of that deed were: "I do hereby emancipate or set free the following men, women, and children, viz: Bob and Daniel, December 25th, 1790, &c." and this language, the court say, imports that the manumission was prospective and coeval with the acknowledgment of the deed; and they say that such would be their construction of the deed were it not for the unequivocal sentiments expressed in it of the grantor's repugnance to slavery. From these sentiments mainly, strongly and emphatically expressed, the court deduced the conclusion that it was the *intention* of the grantor to give immediate freedom to the grantees from the acknowledgment of the deed, reserving to himself a right to the services of the slaves to a designated period. But it is manifest that the court, notwithstanding the emphatic avowal of sentiments and motives utterly inconsistent with slavery, were brought to their conclusion not without great doubt and hesitancy. No such considerations appear in this deed, and we are left to construe it, so far as its own expressions are concerned, according to its literal and grammatical import.

The other cases to which we have been referred by the counsel of the plaintiffs do not invalidate the construction which we have given to the deed. The case of *Fanny vs. Bryant*, 4 J. J. Marshall, 368, was made to turn upon the word "increase," used in the deed; and but for this word it is manifest that the court would have decided against the freedom of Fanny. The other granting words employed in that deed in regard to Julia, the mother of Fanny, except the words 'her increase,' are not unlike those which are used in the present deed, and the court declared that Julia was a slave at the birth of Fanny, and until the first of January, 1816, the period fixed for the determination of her servitude.

In the case of *Charles vs. French, &c.*, 6 J. J. Marshall, 333, the grantor, after the strongest expressions of the sinfulness of slavery, and his hopes of for-

givenness for the past, renounced all claim of power over man, and proceeded to "freely and immediately" liberate Susannah, the mother of Charles, to go free at the expiration of eight years; the court determined that such sentiments, being inconsistent with the right of dominion of man over man, it was the intention of the grantor to emancipate Susannah immediately, with a reservation of right to her services merely, until the expiration of eight years—that she was actually a free person, but not to go free until the termination of eight years.

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The sentiments avowed in that deed are similar to but stronger than those expressed in the deed mentioned in the case in 4 *Dana, supra*, and besides the granting terms themselves, independently of the sentiment expressed, are not incompatible with immediate freedom. The grantor "freely and immediately liberated" Susannah, but she was not to "go free" until the end of eight years—that is, not to go out into the world, free from control, until the expiration of the designated period.

The remaining case to which we have been referred by plaintiffs' counsel is that of *O'Bryan vs. Goslee*, 10 B. Monroe, 100.

The language of the will in that case was: "I give and bequeath to all my negroes their freedom; that my heirs or executors shall have no right or title to them after they arrive at the ages hereinafter mentioned—the males at twenty-eight years, and the females at twenty-five years." This language imparts immediate freedom, with a postponement, simply, of its enjoyment. All the testator's negroes were immediately liberated, but his executors or administrators were to have the right to control them until they should arrive at the designated ages.—This, we think, was the fair and reasonable construction of will. But in the case under review the grantor did not, when all the different clauses of the deed are put together and made to harmonize, confer immediate freedom, with a postponement of its

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3. It is not proper to resort to extraneous facts and surrounding circumstances in the construction of the writings, where the language is susceptible of a clear solution.

enjoyment, but deferred it until a specified time—he “set Poll free from bondage on the 25th day of January, 1814,” and not before.

An effort was made to prove that the grantor in this deed was a Quaker, and entertained principles hostile to slavery, so as to bring this case under the influence of considerations like those mentioned in the cases in 4 *Dana* and 6 *J. J. Mar.*, *supra*; but this effort signally failed of success, for whilst he is shown to have been a Quaker, and to have expressed sentiments in opposition to slavery, it was also proved that he sold Lucretia, the mother of Poll, to a southern trader. But would such extraneous proof be competent to illustrate a deed sufficiently plain of itself? Surrounding circumstances may be brought in aid of the construction of an instrument where its terms are of doubtful solution, but certainly where the language of an instrument is susceptible of clear solution, no resort can or should be had to extraneous testimony to illustrate it.

From the foregoing views it results that the chancellor erred in decreeing the freedom of the plaintiffs. Wherefore, the decree is reversed, and the cause remanded with directions that the petition be dismissed.

A petition for re-hearing filed but overruled.

Case 21.

Burnham vs. Cornwell.

PET. EQ.

APPEAL FROM MARSHALL CIRCUIT.

1. In actions for breach of marriage contract, it is not indispensable that there be direct evidence of an express promise to marry. (*Chitty on Contracts*, 536.) It may be evidenced by the unequivocal conduct of the parties, and by a general, yet definite and reciprocal understanding between their friends and relations, evinced and corroborated by their actions, that a marriage was to take place. (*Wightman vs. Coats*, 15 *Mass. Rep.*, 1; 5 *Shaw & Weston* 144; 2 *Dow & Clark*, 282; *Chitty on Contracts*, 536.)

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2. It is not sufficient that there shall have been a course of attention on the part of the male evincing affection, but a jury must be satisfied that there was a serious promise or offer of marriage accepted as such.
3. There must be an offer of performance of the marriage contract before any action can be maintained for a breach of promise to marry. (*Fible vs. Caplinger*, 13 B. Mon., 384; *Burks vs. Shaine*, 2 Bibb, 341.)
4. A jury is not authorized to infer a promise of marriage from visits, and such respects on the part of the male as are usual in courtships, nor that a promise was made within a year before suit was brought, from the fact that such visits continued to a period within a year from that time; and it was error for the court so to say to the jury.

The facts of the case are stated in the opinion of the Court. *Rep.*

M. Mayes for appellant—

The appellant argued that the Circuit Court erred—

1. In overruling his demurrer to the petition. The original petition states that the appellant agreed and promised to marry the appellee, which he has failed to do, without any averment of an offer on the part of appellee to perform the contract, and a refusal by appellant. The amended petitions filed do not set forth such an offer to marry as will sustain the action. (*Fible vs. Caplinger*, 13 B. Monroe, 469; *Burks vs. Shain*, 2 Bibb, 341.)

2. The Circuit Court improperly admitted the statements of appellee, in respect to the engagement of appellant to marry her, to be given in evidence to the jury.

3. The instructions of the court to the jury were erroneous, and not the law governing the case, and prejudicial to the appellant.

4. There was no proof in the case on which the first instruction could be predicated except the declarations and statement of appellee, not made in presence of appellant.

5. The court should not have instructed the jury in respect to damages for seduction, as none can be recovered in an action for breach of marriage contract. (2 Bibb, 343.)

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6. There was no proof in the case of an offer on the part of appellee to marry appellant.

A new trial should have been granted.

No brief for appellee.

October 10.

Chief Justice MARSHALL delivered the opinion of the Court.

Caroline Cornwell, a widow, brought this action for an alleged breach of promise of marriage, and obtained a verdict and judgment, against William Burnham, for \$500, and his motion for a new trial having been overruled, he brings the judgment to this court for revision.

There was no direct evidence of an engagement or of mutual promise between the parties to marry each other, nor of a promise by the defendant to marry the plaintiff, nor of any offer on the part of the plaintiff to marry the defendant, nor of any request by her that he should marry her. There being no evidence of any engagement or promise to marry there was of course no evidence of there being any time or place fixed on between them for the marriage to take place; and although it be proved that the plaintiff was ready and willing to marry the defendant, this imposed on him no legal obligation to marry her, nor any liability for not marrying her. Even if it appeared that her inclination to marry him was induced by his attentions to her, there must still be a promise to marry on his part, to entitle her to recover damages for his failure, however reprehensible, to meet her just expectations founded upon his own conduct. Nor is it sufficient that there should be a promise on the part of the male—there must be mutual promises—that is, a mutual engagement to marry. Where the promise or offer of the male has been proved, it has been held that the mutuality of the promise or engagement may be proved by showing that the female demeaned herself as if she concurred in and approved of his promise or offer. (*Chitty on Contracts*, 537, and the cases there cited; 3 *Salk.*, 16, 64; 3 *Car. & P.*, 553.) But without proof of an

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offer or promise on his part, even her declaration to a third person, in his absence, that she was willing to marry him, would be wholly incompetent to prove a promise on his part. Such evidence is not admissible to prove his promise.

It is true that to establish a promise, even on the part of the male, it is not necessary that there should be direct evidence of an express promise in *totidem verbis*. (*Chitty on Contracts*, 536.) The author referred to says it may be evidenced by the unequivocal conduct of the parties, and by a general, yet definite and reciprocal understanding between them, their friends and relations, evidenced and corroborated by their actions, that a marriage was to take place.

In the case of *Wightman vs. Coates*, 15 *Mass. Reports*, 1, it is said by C. J. Parker, in an able and interesting opinion on the subject, that a mutual engagement "may be proved by those circumstances which usually accompany such a connection." But it is evident from the context that in making this remark he had particularly in view the proof of a promise on the part of a female, and in that case the evidence of a promise by the male was of a decisive nature. In a note to the same case (*page 5*), is to be found an extract from the case of *Honeyman vs. Campbell*, 5 *Shaw & Weston*, 144; 2 *Dow & Clark*, 282, in which the question as to the proof by which a promise of this kind may be established, is satisfactorily scrutinized by the Lord Chancellor, who, among other things, says, "If I were at *nisi prius*, trying it with a jury, I should inform them that they must be satisfied that there was a promise—a serious promise—intended as such by the person making it, and accepted as such by the person to whom it was made." And this, as it seems to us, is the only safe ground on which to place the circumstantial proof of such a promise. It is not sufficient that there has been, on the part of the male, a courtship—that is, a course of particular attentions evidencing affection. But the conduct and actions of the parties, and the attend-

1. In actions for breach of marriage contract, it is not indispensable that there be direct evidence of an express promise to marry. (*Chitty on Con.*, 536.) It may be evidenced by the unequivocal conduct of the parties, and by a general, yet different and reciprocal understanding between the friends and relations, evinced and corroborated by their actions that a marriage was to take place. (*Wightman vs. Coates*, 15 *Mass. R.*, 1; 5 *Shaw & Weston* 144; 2 *Dow & Clark*, 282.)

2. It is not sufficient that there shall have been a course of attentions on the part of the male evincing affection, but a jury must be satisfied that there was a serious promise or offer of marriage accepted as such.

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ant circumstances, must be such as to satisfy the jury that there was a serious promise or offer of marriage accepted as such.

Mutual promises to marry may doubtless be inferred from the visits of the male to the female, and his declarations that he had promised to marry her.— (*Southard vs. Rexford*, 6 Cowan, 254.) But expressions to third persons of an intention to marry another, not in the presence of the latter, do not amount to a promise to marry. (*Coleman vs. Cottingham*, 8 Car. & P., 75,) though with other circumstances they tend to prove one.

3. There must be an offer of performance of the marriage contract before any action can be maintained for a breach of promise to marry. (*Fible vs. Caplinger*, 13 B. Monroe, 464; *Burks vs. Shain*, 2 Bibb, 341.)

There being no proof in this case of any offer or request at any time on the part of the plaintiff to the defendant that they should be married, and none from which such offer or request could be legitimately inferred by the jury, there was a fatal defect in the plaintiff's case even if a promise to marry, either generally or in reasonable time or when requested, had been proved. (*Fible vs. Caplinger*, 13 B. Mon., 464; *Burks vs. Shain*, 2 Bibb, 341.) And the motion for a non-suit should on that ground have prevailed. And as this proof was not afterwards supplied, there must be a reversal on that ground. But as the case must go back for a new trial, it is necessary to notice the instructions given, or at least the principles on which they seem to be based.

4. A jury is not authorized to infer a promise of marriage from visits, and such respects on the part of the male as are usual in courtships; nor that a promise was made within a year before suit was brought from the fact that such visits continued to a period within a year from that time; and it was

The first instruction authorizes the jury to infer from the visits of the defendant to the plaintiff, and from such respects on his part as are usual in courtships or in making matrimonial engagements, a promise of marriage on his part, &c. The second authorizes them to infer that such a promise to marry was made within one year, (the limitation to the action by law, and on which the defendant relied,) if such attentions as are usual on the part of gentlemen offering matrimony to ladies continued up to within one year. The first instruction makes courtship alone evidence of a promise to marry, and the second is apparently based upon the first; neither of

them declares either that there must have been a promise seriously made or accepted, or that the jury must be satisfied that such was the fact. The fourth instruction is based upon the hypothesis that there being a promise on the part of the defendant within a year, &c., to marry the plaintiff, which might of course be inferred as authorized by the first and second instructions, if there was also an offer on the part of the plaintiff to consummate the marriage, of which latter fact there was no evidence, they should find for the plaintiff, unless, &c. This instruction is infected with the error of the first and second, and is also erroneous in assuming that there was evidence of an offer by the plaintiff to consummate the marriage. The fourth instruction is also subject to the objection, that it refers to the jury, and as a ground of enhancing the damages, the question of the defendant having, by reason of his promise to marry the plaintiff, seduced her, of which fact there is no evidence, and which not being averred, could not be proved. (2 *Bibb*, 343.) The fifth and last instructions are subject to the same objections as the third and fourth, and are more objectionable than either.

Wherefore, the judgment is reversed, and the cause remanded for a new trial in conformity with the principles of this opinion.

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error for the
court so to say
to the jury.

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Case 22.

APPEAL FROM NELSON CIRCUIT.

PET. EQ.

1. The Circuit Court has no jurisdiction to order the sale of infants' real estate, whether they be plaintiffs or defendants to a proceeding for that purpose, until commissioners make report, under oath, to the court the net value of the infant's real and personal estate, and the annual profits; these provisions of the law must be strictly pursued. (*Revised Statutes, chapter 6, article 3, page 592.*)

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2. If defendant to such a proceeding be an infant the guardian must file an answer, under oath, setting forth his belief that a sale will redound to the interest of his ward, before the court can decree a sale. A sale made without a compliance with these prerequisites is void.

The facts of the case are stated in the opinion of the Court. *Rep.*

Grigsby & Carpenter for appellants—

The appellants purchased real estate, under a decree of the Nelson Circuit Court, belonging to infants, and finding the proceedings void, for error in conducting the case to a hearing, moved the court to quash the sale, and proceeding for errors apparent on the face of the record, which being overruled they have appealed to this court.

They contend—1. That the court had no jurisdiction to decree the sale. The *Revised Statutes*, 592, says, "That before a court shall have jurisdiction to 'decree a sale of infant's land three commissioners 'must be appointed to report, and must report, under oath, to the court, the net value of the infant's 'real and personal estate, and the annual profits 'thereof, and whether the interest of the infant or id-'iot requires the sale to be made.'" In this case only two commissioners were sworn—the third was not sworn. They failed to report the annual profits of the estate.

2. The statute also requires "that all persons interested in the land, and the statutory guardian of 'the infants, if any, who are not petitioning, must be 'made parties." (*Revised Statutes*, 592.) Mrs. Glasscock's children are named as parties in the petition as non-residents. No service on them, nor any warning order against them. The clerk was appointed guardian *ad litem*, and filed an answer, but gives no consent to a sale, asking the court to protect their interest. These children own one eleventh of the land, and this proceeding did not authorize the sale thereof, consequently the purchaser will fail to get

it. It could not be divested without the consent of the statutory guardian.

3. No bond was given by guardian, without which the decree for sale is void. (*Revised Statutes*, 592, 3.) There is no evidence in the record that there are any guardians for any of the parties.

4. The interest of Mrs. Hinton is vested in two trustees—one only consents to a sale of her interest. Is that sufficient to pass the title? Again: the devise to trustees for the benefit of Mrs. Hinton is for her life only, and then to her heirs. Are they not necessary parties also?

5. Two of the females, Emily and Sarah, answered without oath, consenting to the sale; subsequently, and before the decree, they married; the husband of Emily answered, consenting to the sale; but his wife now occupies a different position from that which she occupied when she answered, and her brothers and sisters have an interest in her share. The statute requires that the husband shall give bond, and that the proceeds of the sale shall, in certain contingencies, pass to her kindred. The husband should be brought before the court by amended petition. He cannot make himself a party by filing an answer alone, in a case where there is neither petition or process against him.

In regard to Sarah, the other who married, there is no notice taken of the fact before the decree, tho' after the motion was made Sarah and her husband tender their deed, yet she has not been privily examined, which was indispensable to pass her title. But bond was also necessary to secure to her the principal fund, and to her children in case her husband survive her, or to her heirs in case she have no children. (*Revised Statutes*, 594.)

The representative of the donor was also a necessary party to the proceedings.

The statute on this subject confers a special jurisdiction, under certain clearly defined circumstan-

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cas, and without all the facts giving the jurisdiction appear in the record, the jurisdiction fails.

It is believed that the proceeding was without authority, and should be reversed and held for naught.

James Harlan for appellees—

If the appellants had any valid objection to the sale, at which they were the purchasers, they should have interposed that objection before the sale was confirmed by the chancellor. By the final decree of June, 1854, confirming the sale, the parties were out of court.

Final decrees may be annulled and reversed in two ways: 1. By appeal or writ of error. 2. By bill of review. They may be modified, changed, or entirely abrogated by the court at the term they are rendered, but after the term has closed such decrees are beyond the control of the judge who rendered them, at any subsequent term. Whether the appellants might not obtain relief upon the grounds here relied upon, upon an original bill brought to avoid the contract, will not now be discussed, but it is insisted that the remedy now sought by motion, *ex parte*, is unknown in a chancery proceeding, under the circumstances appearing in this record.

If the court shall not concur in the first view of the question, then the following reasons are submitted why the judgment of the Circuit Court, dismissing the motion, should be affirmed:

1. The Nelson Circuit Court had jurisdiction of the persons and the subject matter upon which the decree was to operate, and consequently the decree was not void. If merely erroneous will this court adjudicate upon the supposed errors when presented collaterally? If decrees are not void they are binding upon all parties and privies until reversed, and the mode of proceeding to obtain a reversal is pointed out by law.

The first objection to the proceeding is that the petition is filed by the heirs, by their guardian, instead

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of in the name of their guardian. This is extremely technical. It is meant that the petition should read "Wm D. Strother, guardian for Catharine Strother, &c.," instead of "Catharine Strother, &c., by Wm. D. Strother, their guardian." Is there any substantial difference? The petition is signed and sworn to by the guardian, and it contains a separate and independent paragraph in these words: "Wm. D. Strother, the guardian of said infants, says he verily believes a sale of the land would redound to the interest of his said wards, and therefore prays a sale of the same." The statute is substantially complied with.

2. It is objected that the report of the commissioner does not conform to the statute. The report shows the value of the interest of each of the petitioners in the land, slaves, and personalty, and the opinion is expressed that it would redound to the interest of the children that the land be sold.

3. That the report says nothing in regard to the interest of the infant defendants. The statute is not understood by the counsel of appellees as requiring the same proceedings to be had, in respect to the infant defendants as the infant plaintiffs. The guardians of the infant defendants, as well as the infant plaintiffs, are required to execute bond to secure the payment of the money received from the sale, which has been done in this case.

The 4th, 5th, and 6th objections may be considered together. The first asserts a principle of practice, and the two others are stated as examples not in conformity to the principle. The statute does not require the husband to make his wife a defendant—in effect, to sue her. Two of the daughters, Emily and Sarah, filed separate answers consenting to a sale of the land, but it is now said that as they have been married subsequently, and their answers are not binding on them. No effort was made to change the answers by amendment or otherwise, and neither they, nor any person claiming under them, can take

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advantage of their subsequent marriage. The husband of Emily filed an answer consenting to the sale; and as to the other, Sarah, who married Belmear, there is a conveyance tendered to the purchasers. This being done every ground of complaint is removed.

Two other objections only require notice. 1st. As to Mrs. Hinton. She and her husband and her trustees all answered, giving their consent to the sale. 2. As to the children of Mrs. Glasscock. A guardian *ad litem* was appointed by the court—the father of the children, and their natural guardian, who answered consenting to the sale.

All the bonds required by the statute were executed in due and proper time and form.

A close inspection of the record will satisfy the court that all the substantial requisitions of the statute have been complied with; and a conveyance by a commissioner of the court, upon the payment of the purchase money will invest the purchasers with all the title which the ancestor of the appellees possessed.

October 10.

Judge SIMPSON delivered the opinion of the Court.

This is a motion made by the purchasers of a tract of land which was sold by a commissioner, under a judgment of the Nelson Circuit Court, rendered in an action brought in 1852, for the sale of real estate of infants, to quash the sale, and the sale bonds executed by them, on grounds appearing in the record of said proceedings.

The petition was filed in the name of three of the infant heirs, who sued by their statutory guardian, and the other heirs, some of whom were infants and others married women, were all made parties to it. A judgment ordering a sale of the whole land was entered at the August term, 1853. A sale was made in pursuance of the judgment, at which the plaintiffs in the motion were the purchasers. The commissioner's report and sale were approved and confirm-

ed by the court at the June term, 1854. This motion was not made until the February term, 1855.

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Before considering the objections made to the validity of the sale it becomes necessary to decide a preliminary question with respect to the power of the Circuit Court to quash the sale, which had been confirmed by it at a previous term. It is contended that the purchasers can only obtain relief, if they be entitled to any, by an application to a court of equity, and that the judgment directing a sale, and the order of its confirmation, are final, and cannot be vacated except by an appeal to this court, or by such proceedings in the Circuit Court as are authorized by the *Code of Practice*, section 579.

The Circuit Court had no power in this motion to vacate the judgment, but if it be void because the requisitions of the law have not been complied with, and the purchasers have not acquired any title by the sale made under it, the court certainly has the power to treat the whole proceedings as void, and to quash the sale and the sale bonds executed by the purchasers.

The first objection made to the proceedings is that the petition was filed in the name of the infants when it should have been in the name of the guardian alone. The petition was substantially a joint one by the infants and the guardian—the latter swearing to the petition, and consenting that his interest as one of the heirs might be sold if the court should be of opinion that a sale of the land would redound to the advantage of his wards. The law requires the petition to be filed by the statutory guardian, and to be verified by his affidavit; it also requires all the persons interested in the land, and the statutory guardians of the infants, if any, who are not petitioners, to be made parties. It seems to contemplate some of the infants as petitioners, and as they should be made parties, either as plaintiffs or defendants, the fact that they are plaintiffs in the petition will not render the proceedings invalid.

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But other objections, of a more serious nature, are made to the proceedings on the petition. The commissioners who were appointed to ascertain and report in relation to the infants real and personal estate, and the annual profits thereof, failed in their report to state either the amount of the personal estate, exclusive of slaves, or the annual profits of the estate.

By the *Revised Statutes, chapter 86, article 3, page 592*, it is enacted that before a court shall have jurisdiction to decree a sale of infants land "three commissioners must be appointed to report, and must report under oath to the court, the net value of the infant's real and personal estate, and the annual profits thereof." These facts are required to be reported to enable the court to determine whether or not a sale of the land in the petition mentioned would be to the benefit of the infant. Until this has been done the court has no jurisdiction to decree a sale of the land, and consequently any such decree or judgment, if rendered before a report has been made in conformity with the statute, is unauthorized and void. The law in this respect must be strictly complied with, and the report of the commissioners must be full and explicit on all the matters which, by the statute, they are required to ascertain and communicate to the court.

1. The Circuit Court has no jurisdiction to order the sale of infant's real estate, whether they be plaintiffs or defendants to a proceeding for that purpose, until commissioners make report under oath to the court the net value of the infants' real and personal estate, and the annual profits. These provisions of the law must be strictly pursued. *Rev. Stat., chap. 6, art. 3, p. 592.*

When any of the defendants are infants, and have an interest in the land, their interest therein can only be sold when their guardian shall file an answer stating his belief that a sale of it will redound to their benefit, and commissioners appointed for the purpose have made such a report as the law requires. The statute is clear and explicit in providing that the court shall have no jurisdiction to decree a sale of infants lands until this be done. This provisions applies to all the infants, whether plaintiffs or defendants. As some of the defendants were infants, and this mode of proceeding was not adopted, the court had no power to sell their part of the

land, consequently the judgment ordering a sale is void as to that part of the land which belonged to any of the infant heirs.

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Other objections have been made to the proceedings, but as they, if valid at all, would not render the judgment void but only erroneous, or at most voidable, we do not deem it necessary to consider them, inasmuch as they cannot be relied upon in this motion.

Wherefore the judgment dismissing the plaintiffs' motion is reversed, and cause remanded with directions to quash the sale and the sale bonds executed by the purchasers.

Henderson and Nashville Railroad Company vs. Case 23.
Dickerson.

APPEAL FROM TODD CIRCUIT.

ORD. PET.

No appeal is authorized in controversies between the Henderson and Nashville Railroad Company and individuals, unless the appeal be prayed at the time of rendering the judgment, and an appeal bond entered into within the time allowed by the court for that purpose. (*Acts of 1850-1, page 281.*)

On the 19th May, 1854, a jury was impaneled under the 38th section of the act chartering the Henderson and Nashville Railroad Company, to ascertain the amount of damages that would result to Dickerson from running the road through his land. They found a verdict in his favor for \$1,636. This verdict was returned to the Todd County Court, on the same day, a motion made by the company for a new trial, which was overruled, and judgment rendered in behalf of appellee upon the finding of the jury. The appellant excepted to the opinion of the court, and spread the evidence on the record by Case stated.

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bill of exceptions, and prayed an appeal to the Court of Appeals, and executed bond, dated 19th May, 1854.

A copy of the record was not filed in this court until after the lapse of more than two terms of this court after granting the appeal

The charter provides, (see *Session Acts of 1850-1*.) that the party appealing shall be governed in all respects by the laws regulating appeals in the state where the case or cases may be tried. At the time the judgment was rendered in this case, the law required that appeals should be prayed at the time of rendering the judgment. (1 *Statute Law*, 128.) And the appellant was required to file a copy of the record with the Clerk of the Court of Appeals, on or before the third day of the second term next ensuing the appeal. (1 *Statute Law*, 131 to 133.) The last requisition of the statutes not being complied with, it was insisted by appellee that the appeal should be dismissed.

Robert McKee, for appellee—

Moved the court to dismiss this appeal, upon the ground that the appeal was not legally before this court.

He argued that the benefit of the appeal prayed, when the judgment was rendered, was lost to the appellant by the failure to file the record in proper time.

That the provisions of the amended Code of Practice, found on page 288, has no application to this case. The charter was granted in 1851. The judgment appealed from was rendered on the 19th May, 1854. The provisions of the Code respecting appeals did not take effect until the 1st of July, 1854.

The charter gave the parties, in cases arising under it, a right "to appeal." The word *appeal* had a specific legal meaning, and is used in the charter in the sense given to it by our statutes then in force as recognized by the profession and acted upon by the

courts. The right given is a right to appeal as contra-distinguished from a writ of error. Neither the railroad company nor those having controversies with them in regard to right of way could prosecute a writ of error. There was a valid reason for allowing an appeal instead of a writ of error. The writ of error might be prosecuted at any time within three years, and without bond and security to perform the judgment, and the parties had to be brought into this court by process; whereas, in cases of appeal no process was necessary, and the record must be filed in a specified time, thus tending to bring the contest to a speedy issue. The express right of appeal being given, is a negation of the right to prosecute the writ of error. The proceedings in this case were commenced before the passage of the act of 10th March, 1854, regulating appeal. By that act proceedings in the court which had been previously designated as writs of errors, are now called appeals; and the distinction between writs of error and appeals is abrogated. This change, however, does not affect the meaning of the word "*appcal*," as used in the charter of appellant. It cannot produce any change in the rights of the parties under the laws in force at the time the right of action accrued. It was not then in force. It cannot enlarge the right of appellant, nor injuriously narrow those of appellee. The act was not intended to be retroactive.

The appeal should be dismissed.

James Harlan for appellant—

Contended in opposition to the motion to dismiss the appeal, that under the 38th section of the amended charter of the Henderson and Nashville Railroad Company, approved March 8, 1851, (*Session Acts*, 1850-1, vol. 2, page 296,) the proceedings authorized by that section were taken by the company against R. Dickerson, which resulted in a verdict in favor of Dickerson for \$1,636; and the company has brought the case to this court for revision.

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The counsel for Dickerson has presented, for the decision of the court, a preliminary question, which is, that as the railroad company did not execute an appeal bond within the time prescribed by law, its remedy for revising the proceedings of the inferior court is forever gone.

The language of the section which authorizes an appeal to an appellate tribunal shows it was intended to apply to two states, Tennessee and Kentucky, and it provides: "And the parties shall, either of them, have the right of appeal to the Supreme Court or Court of Appeals. The parties appealing shall be governed, in all respects, by the laws regulating appeals in the state where said case or cases may be tried."

"The right of appeal" was intended to give to either party the right of having the question re-examined in a superior court, in any manner a case could be brought to that court. The right to prosecute a writ of error was not intended to be taken away, because by the common law it was regarded as a matter of common right. If the draftsman of the act had intended to confine the privilege to *appeals*, and to prohibit the emanation of a writ of error, the appropriate language would have been used. But it seems to me the word "appeal" was intended to be understood in its broadest and most comprehensive sense, and not in the restricted and technical sense contended for by the counsel for Dickerson. The act should receive a liberal construction. No reason is perceived why a writ of error was not intended to be embraced.

[The remainder of the brief is omitted, as the opinion of the case is confined to the question of the right of appeal.—*Rep.*]

October 12.

Judge SIMMONS delivered the opinion of the Court.

The first question to be considered is the right of the appellant to prosecute this appeal. The decision of this question depends upon the construction

of the act, approved March 8th, 1851, "entitled," an act to amend an act, "entitled, an act to amend and re-enact an act, entitled, an act to incorporate the Henderson and Nashville Railroad Company." (*Vol. 2, Sess. Acts, 1850-1, page 281.*)

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At the time of the passage of this act, the judgment of an inferior tribunal had to be brought to this court for revision, either by writ of error or by appeal. If by appeal it had to be prayed for at the term at which the judgment was obtained, and an appeal bond executed within the time allowed by the court for that purpose. No appeal of that kind was taken in this case, which was brought here about a year after the judgment was rendered, by the appeal which is substituted by the Code of Practice, for the writ of error.

By the 38th section of the statute above referred to, it is provided that in a case of this kind either of the parties shall have the right of appeal to the Supreme Court or Court of Appeals, and that the party appealing shall be governed, in all respects, by the *laws regulating appeals* in the state where said case may be tried.

As the right of appeal is given by the statute, this, by a liberal construction, might, if the act contained nothing that indicated a different legislative intention, be understood to mean a right to have the judgment revised by the Court of Appeals, in any mode which the law authorized. But such a construction is forbidden by the statute itself, inasmuch as it prescribes the mode in which this right shall be exercised. The party appealing shall be governed in all respects by the *laws regulating appeals*. The laws regulating appeals were different from those regulating writs of error; as the party appealing had to be governed by the *laws regulating appeals* he could not prosecute a writ of error, because that mode of appealing was governed by laws entirely variant from those regulating appeals.

No appeal is authorized in controversies between the Henderson and Nashville Railroad Company and individuals, unless the appeal be prayed at the time of rendering the judgment, and an appeal bond entered into within the time allowed by the court for that purpose. (*Acts of 1850-1, page 281.*)

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Important considerations may have induced the legislature to limit the right, so that it should only be exercised by an appeal and not by a writ of error. The former had to be prosecuted immediately, and the parties were apprised that the operation of the judgment was suspended by it. The latter might be prosecuted at any time within three years after material changes in the condition of things had occurred, and even after the judgment had been satisfied, and apparently acquiesced in by all parties. To guard against the inconveniences which might result from such delay, the legislature deemed it proper to restrict the right to have the judgment revised to the proceeding by appeal. As then neither party could have prosecuted a writ of error in this case, for the reversal of the judgment, this appeal, which is allowed in the place of the writ of error, cannot be maintained.

Wherefore the appeal is dismissed for want of jurisdiction.

Case 24.

Steamboat Crystal Palace vs. Vanderpool.

PET. EQ.

APPEAL FROM LOUISVILLE CHANCERY COURT.

Steamboat owners are regarded and held to the responsibilities of common carriers; but are not responsible to passengers for the loss of their wearing apparel which they carry about their person, and not delivered to the officers of the boat as baggage for safe keeping.

The facts of the case are stated in the opinion of the Court. *Rep.*

Barret & Wood for appellant—

If the boat and owners are legally liable to compensate appellee for his loss it must be upon the

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principle which renders inn-keepers responsible, or by the rigid rules applicable to common carriers.

It is supposed that the boat is not responsible as an inn-keeper would be. The boat is not required to obtain a license to entertain. It is confined to no particular locality—running from one commercial point to another, as interest may prompt. Inn-keepers obtain a license for a particular locality, and are bound to receive and entertain when requested. It might be different if the boat had been a regular packet plying between designated points, asking the traveling community for their patronage. Such was not the case here. The appellee was not a *guest*, in the technical sense, but a *boarder*: and the boat owners not liable as inn-keepers. See 1 *Parsons on Con.*, 628, in which the author uses this language: "In this country it is very common for persons to become boarders at an inn, and they cease to be guests in such a sense as to hold the inn-keeper to his peculiar liability, and on the other hand give him his lien. We take the distinction between the guest and the boarder to be this: the guest comes without any bargain for time, remains without one, may go when he pleases, paying only for the actual entertainment he receives, and it is not enough to make him a boarder and not a guest that he had staid a long time in the inn in this way, &c."

The boat cannot be made liable in this case, as common carriers, for these reasons:

1. The loss was not the result of the carelessness of the officers of the boat, but of the negligence and indiscretion of the appellee himself.

2. But if the loss was the result of the defect in the fastenings of the door of the state-room occupied by the appellee, yet there is no liability. The proof shows that the goods lost were never committed to the care of the officers of the boat, but retained by the appellee under his own care—in such cases the owner must bear the loss himself. See *Angel on the Law of Carriers*, page 520, section, 522: "The

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carrier is not responsible for the safe delivery of an article of baggage which the owner has kept entirely within his own custody." "The baggage must be fairly in the custody of the carrier." (*Same book*, p. 113, section 113; *Parsons on Contracts*, vol. 1, p. 690, note V; also *Story on Bailments*.)

We ask a reversal.

G. A. & I. Caldwell on the same side—

By the common law carriers are held to very strict responsibility for goods delivered to be conveyed; and carriers of persons by land or water are under an implied obligation, growing out of the contract to carry the person, almost if not quite as stringent as to the baggage of the passenger as carriers of goods. But this implied obligation has reference only to what is usually denominated *baggage*, and then only when placed in the custody or under the control of the carrier. The doctrine has never been held to embrace the clothing worn by the passenger, or to his watch, pocket-money, or jewelry worn upon or carried about the person. (9 *Wendell*, 117; 10 *Ohio Reports*, 145.) In these cases the carrier was held liable because the articles were placed in a trunk and placed in the possession of the carrier.

It is said in *Hawkins vs. Hoffman*, 6 *Hill*, 189, that no contract is implied to carry any thing safely which is not usually carried as *baggage*; money, clothing, and valuables carried about the person are not baggage, and a carrier is not responsible for their loss. (*Tower vs. Utica and S. R. Co.*, 7 *Hill*, 47; *Story on Bailments*, secs. 532, 3, page 578; *Angel on Law of Common Carriers*, secs. 332 and 113; *Blanchard vs. Isaacs*, 3 *Barb. Supreme Court Reports*, 388; *King vs. Shepherd*, 3 *Story*, 349.)

The application of any principle of the civil law to the case is not admitted. It is by the common law this case must be decided, and not the civil law. We deny that the law can be changed to keep pace with modern improvements without legislation.

The law will not imply any obligation to convey or keep safely that which the appellee had under his own charge in his room, and under a full knowledge of the insecurity of the fastenings to the door; and he knew that there was a safe on the boat where the valuables and money could have been secure if committed to the officers of the boat. The loss was the result of the imprudence and gross neglect of the appellee, and there is no responsibility. (*Armstead vs. White*, 6 *English Law and Equity Reports*, 349.)

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The following authorities are referred to as bearing on the case: *Story on Bailments*, sec. 544, et seq. 604, 601, 590, 595, et seq.; *Brigham vs. Rogers*, 6 *Watts & Sargeant*, 495; *Lang vs. Colder*, 8 *Barr. Penn.*, 479; 1 *Bouvier's Institutes*, sec. 1036; *Abbot on Shipping*, part 3, C. 3, L. 11.

We unite in asking a reversal.

Bullitt & Smith for appellee—

The common law is unquestionably a progressive science; it has adapted itself to the various exigencies of its adventurous sons. The same common law that governs the tens and hundreds of Saxons of England, has adapted itself, under a wise judiciary, to meet the wants of millions in every climate, and on every continent. This progress has always been healthful, since it has been in the direction of fixed principles, and by their application to the continually changing phases of an advancing civilization.

It is on this principle of advance in well settled principles that success is expected, in this case, for the appellee.

Since the introduction of steam navigation the duties and liabilities of common carriers have been enlarged. The vast difference between the discomforts of a sailing vessel and a flatboat is too striking to need notice. What might once have been rashness and imprudence in a passenger might now be considered great care. Once the traveler looked to his own safety and protection; the carrier now, in the

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advance of the age, agrees to take care of him, and this adds not a little to his comfort.

The common carrier in this age has added to his business that of inn-keeper; he not only transports his passenger but he feeds and lodges him—not as he would transport cattle, but he furnishes him with every luxury as a first class hotel would; he offers every inducement for the traveler to throw himself upon his hospitality—to come as gentlemen and ladies to enjoy a delightful excursion, and not as adventurers; the passenger is authorized to feel as safe as if in a hotel.

The common carrier has assumed the province of an inn-keeper, and ought to be held accountable as such. This is an application of a fixed principle in a legitimate direction.

2. We say that as common carriers the appellant is liable on the ground of liability for the traveler's baggage, which we contend means "such articles of necessity and personal convenience as are usually carried by travelers." (*Angel on Carriers*, 116; *Borders vs. Dan*, 25 *Wendell*, 459; *Hawkins vs. Hoffman*, 6 *Hill*, 506; *Camden and Amboy Railroad vs. Brooks*, 13 *Wendell*, 611; *Orange County Bank vs. Brun*, 9 *Ib.*, 85.) The distinction is this: common carriers are not liable for goods and merchandise put in trunks and passed as baggage, nor for large sums of money, but only for such conveniences as the habits of a traveler demand for his comfort, but this is not to be measured by any fixed rule, but depends upon many circumstances applicable to the means, habits, and business of the traveler. The carrier receives a compensation not merely for the transportation of the traveler from place to place, but for the safe-keeping of his person and baggage at the place of destination. And shall he be responsible for the valise and a few articles of necessary apparel, and not for the watch under the sleeper's head, or coat upon the state-room wall, which are subject to exactly the same casualty, and demanding the same sort of pro-

tection? The coat does not change its character as baggage by being on or off the traveler. The clothes, the watch, the diamond pin, and money, did not change its character of baggage by being laid off for the night in the state-room.

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The court is referred to the opinion of the chancellor for what is or ought to be the law of the case.

Judge CRENSHAW delivered the opinion of the Court.

October 13.

Vanderpool having been robbed of his gold watch and chain, and diamond breast-pin and a sum of money, on his passage on the steamboat Crystal Palace from Paducah to Louisville, brought this suit against the boat to recover compensation for his loss. He occupied on the trip state-room No. 10, and, before retiring to rest on the night of the larceny, he communicated to a servant on the boat the fact that the lock on his room door was out of order, and that the door could not be fastened; he was told by the servant that there was no way to fasten it except to put a chair and his baggage against it, which he did. The watch and chain, breast-pin, and money were worn and carried on the person of the plaintiff, and on retiring to bed they were placed on a chair, and a shirt thrown over them. On the following morning the articles were discovered to have been stolen during the night.

Steamboats are, in some respects, analogous to inns, and it would greatly promote the ease, comfort, and safety of the traveling community if their owners were held responsible to the same extent that inn-keepers are; but, so far as we know, they have never been held accountable upon the principles applicable to inn-keepers, and we suppose that thousands of instances have occurred on steamboats, of depredations like the one perpetrated on the plaintiff, and yet we have heard of no case in which the principles of law governing inn-keepers have been extended to steamboat owners, except in the case under consideration. The chancellor, regarding the

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safety of the traveling community of the highest importance, and judging that reason and propriety required that steamboat owners should be held responsible in cases like this, determined that the defendant should pay the plaintiff for his loss. But altho' we concur with the chancellor in the importance of the subject, and think that there are many good reasons why the responsibility of the owners of steamboats should be enlarged, we know of no principle of the common law which will authorize a recovery in this case, and we have no statute upon the subject. We do not feel authorized, therefore, in the absence of any statutory regulations, and any common law authority upon the subject, to establish a new rule and apply a new principle, but think that the matter is one peculiarly of legislative cognizance.

Steamboat owners are regarded and held to the responsibilities of common carriers; but are not responsible to passengers for the loss of their wearing apparel which they carry about their person, and not delivered to the officers of the boat as baggage for safe keeping

Steamboat owners are regarded as common carriers, and are subject to the well established principles governing their responsibilities; and we are not aware of any principle by which common carriers can be held responsible for the wearing apparel of the passenger, or his money which he carries upon his person, and which is under his own immediate care and control. When such things are made baggage, and are delivered to the owners or their agents, the rule is different, and their responsibility is regulated by the established rules in reference to the baggage of passengers.

The fact that the lock was out of order, and that this was made known to a servant, cannot, in our opinion, make the boat responsible as a common carrier—the plaintiff choosing to retain the articles under his own care, instead of delivering them into the care and custody of the officers, especially as the conduct and declarations of the plaintiff were calculated to invite the depredations committed upon him.

Wherefore the judgment is reversed, and the cause remanded that the petition may be dismissed.

CARR & WIFE
vs.
ESTILL.

Carr and Wife vs. Estill.

APPEAL FROM FAYETTE CIRCUIT.

Case 25. 18bm309
118 426
18bm309
119 904
Pet. Eq. 18bm303
e121 25

A testator devised "to Mary Baker Didlake and her children" a tract of land; at the time of the devise, the devisee, Mary, had no children; she afterwards had one child: Held, that Mary B. Didlake took an estate for life, and the child the remainder.

The facts of the case are fully stated in the opinion of the court.—*Rep.*

Robinson & Johnson and C. D. Carr for appellants—

The clause of the will out of which this controversy arises is in these words: "All the remainder of my property, real and personal and mixed, I now have, or may have, or may be coming to me, of every kind and description, I give to my beloved wife to do with as she pleases, except the land I now own; that part or parcel where my house sets, together with the portion cut off by the turnpike and adjoining George Clark's, I bequeath to Amanda F. Estill, and at her death to her son, Robert F. Estill; and the remainder, which includes the Nicholas tract, which I bought of him, together with the portion cut off by the Dudley tract, by the turnpike and the Bryant's road, I bequeath to Mary Baker Didlake and her children."

At the death of the testator, Mary B. Didlake was an infant, unmarried. She subsequently married C. D. Carr, and had one child.

The appellants contend that an estate in fee passed by the devise to Mary Baker Didlake—

1st. Because by the legal import of the words used by the deviser an estate tail was created, which by force of the statute is converted into an estate in fee simple. It was conceded by court and counsel in the court below, that the word *children* have been, and must necessarily be, construed to mean the same thing as *heirs* or *issue*; and a long list of English au-

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thorities might be cited to establish the proposition that a devise to a man "and his children, or the children or the issue of his body," will, if he had no children at the time, vest him with an estate tail. The court is referred to the leading cases. (*Field's case*, 6 *Tenn. Rep.*, 17; 3 *Tenn. Rep.*, per Butler Judge; *Fern on Contingent Remainder*, 202, and notes, 3 *Am. from 8th London ed.*; by Butler.) In 1 *Vezy*, 201, Lord Hardwicke says, that "children bear a co-extensive sense with issue." (2 *Black. Com.*, page 45, note 20; *Ib.*, 381, note 22, and authorities there cited.)

In *Cruise Digest*, 4 *Am. ed.*, by Huntington, title 38, chap. 12, page 258, vol. 6, sec. 27, we find the following: That "where lands are devised to A and his children, or to A and his issue, A having no children at the time, A will take an estate tail, because it is clearly the intention of the testator not to give A an estate for life only, but that his children should be benefited by the devise, and they cannot take as immediate devisees not being *in esse* at the death of the testator, nor can they take by way of remainder, the devise being immediate." Besides these English cases, the following American authorities are referred to: 1 *Pick.* 147; 3 *Ib.* 360; 3 *Searg. & Rawle*, 470; *Roper on Leg.*, 1 *Am. from 3 London ed.*, chap. 2, sec. 1, page 69. Such is the construction of the devise at common law, or "as the law aforesaid was," in the language of our statute docking entails.

There is no intention shown in any part of the will to give Mrs. Carr less than a fee in the land.

The rule in *Shelby's case* has nothing to do with the construction of this devise; but it should be construed in view of the rules of construction of legal instruments in England, Virginia and Kentucky at the date of the act of 1796; and for those rules of construction the court is referred to the leading cases in Virginia of *Hill vs. Burrows*, and *Tate vs. Tolly*, 3 *Call's Rep.*

2. We maintain that upon a fair construction of the whole will, the testator shows a clear intention to

pass a fee simple estate on the land. The words *child* or *children* in England are not so apt or strong as words of limitation as the word *heirs*. This was the result of the law of primogeniture, but in Kentucky an old statute and the Revised Statutes use the word *children* or *child* in lieu of the word *heirs* or *heir*, in the statute of descent and distribution, and all the children are heirs. It is clearly inferable that in this clause the testator intended to use the word *children* as meaning the same as heirs. This, as has been decided in the case of *Lackland vs. Downing's heirs*, 11 B. Mon., 32, that a devise to A and his children forever passed a fee simple.

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It is to be observed that the testator makes no devise over of the estate, in case of a failure of children of the devisee. And there is no residuary clause in the will or any of the codicils, making any provision for a reverting or falling back of the estate, or any part of it, which was devised. The testator clearly intended to dispose of his whole estate.

The testator had, by appropriate words, disposed of another part of his estate in the way which the appellee insists that this shall pass, viz: that to Mrs. Estill and at her death to her son, Robert Clifton Estill, showing that he knew what were the appropriate words to be used to pass an estate for life, with remainder over. And it is fair to presume that if he intended only to pass a life estate to the devisee with remainder to her children, he would so have expressed himself.

If the words *her children* were stricken out, and the words *her heirs* substituted, would the court hesitate to say that a fee passed? We suppose not. We think the Circuit Court erred in its construction of the devise.

No brief for appellee on file.

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October 15.

Judge CRENSHAW delivered the opinion of the Court.

Clifton R. Ferguson, on the 28th day of September, 1847, made a will by which he devised "to Mary Baker Didlake and her children," a tract of land in the county of Fayette. At the time of this devise, the devisee was unmarried, and without children. She has since married and has one child, and her husband, Carr, having sold the land to Estill, and his wife being willing to unite with him in conveying the land, the question is presented whether Carr and wife can convey an absolute fee simple estate in the land to the purchaser.

It is stated in *Powell on Devises*, 494, as a rule of construction in England that where lands are devised to a person and his children, and he has no children at the time of the devise, the parent takes an estate tail. By our law an estate tail is converted into a fee simple; so that this rule of construction would give to Mary Baker Didlake an absolute fee in the land, and any children which she might thereafter have would be cut off, and could take no interest under the devise. This English rule of construction was adopted in order to effectuate the intention of the testator. For, as it is said, "the intent is manifest and certain that the children should take, and as immediate devisees they cannot take, because they are not in *rerum natura*, and by way of remainder they cannot take, for that was not his intent, for the gift is immediate, and therefore such words shall be taken as words of limitation." Now, although, the words abstractly and literally import an immediate gift, not only to the devisee *in esse* but to his or her children also; yet if there be no children at the time, does it necessarily follow, as seems to have been supposed, that it was not the testator's intent that the children should take by way of remainder? We think not. But whatever may have been the legitimacy of such a conclusion in England, where in general more precision and particularity were observed in the creation of remainders than in this

country, we are of opinion, that with us it does not necessarily follow, that because the words literally and abstractly import an immediate gift, it was not the intention of the testator to give a remainder interest to the children. In general, the word "children" is a word of purchase and not of limitation, and as it was acknowledged by the jurists of England that the word, in its present connection, manifested a certain intent on the part of the testator, that the children should take under the devise, and as they would do so there, if the word were construed to be a word of limitation, and not a word of purchase, it was natural and easy for the English judges to make an exception to the general acceptance of the words, and so construe it as to render the estate devised an estate tail; and as this was a convenient mode of giving effect to the intention of the testator, the courts of England adopted it, without perhaps bestowing much consideration on the question, whether the testator might not have intended to give a life estate to the person *in esse*, remainder to the children, which might equally have effectuated his intention. However this may be, it is clear that they adopted their rule of construction to promote the intention of the testator. And our law having converted estates tail into absolute *fee simple* estates, it is equally clear that if we adopt the same rule of construction, the acknowledged intention will be frustrated and defeated, as the children could then take nothing under the devise. In order, therefore, to effectuate the acknowledged and manifest intent of the testator, it is obvious that a different rule of construction must be resorted to in this state.

It has been observed that the words of the devise, abstractly and literally, import an immediate gift not only to the devisee in being, but to those not in being. But there being no children *in esse* at the time of the devise, it could not have been the intention to give an immediate estate to them, for that

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A testator devised to "Mary Baker Didlake and her children" a tract of land. At the time of the devise the devisee, Mary, had no

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children; she afterwards had one child: Held, that Mary B. Didlake took an estate for life, and the child the remainder.

were impossible. And as the words of the devise, as conceded by all the authorities, manifest a clear intent that the children shall take, the only consistent and rational construction is, that the testator intended the devisee, in being at the time, should take a life estate, remainder to the children. A slight change in the phraseology of the devise will manifest the propriety of this construction. Suppose the testator had used the words, "to Mary Baker Didlake and the children she may bear," (which was obviously his meaning,) would it not be clear that, as there were no children in being at the time, and might not be at his death, he intended to vest an immediate estate in Mary Baker, and a future one in her children.

It necessarily results that as the children must take under the devise, if effect is given to the intent, and as it is impossible for them to do so *in presenti*, they must take *in futuro*. The reason of the English rule of construction failing in this state, the rule itself must fail, and the necessity is imposed upon us of resorting to a different rule of construction to carry out the intention of the testator. And the construction which we have given to the words of the devise is, as it appears to us, rational and natural. The mother, and also the children she might have, being objects of the testator's bounty, and there being no children *in esse* at the time of the devise, who could take jointly with the mother according to the literal import of the devise, we conclude that the intent was to give the mother a life estate, and the remainder to the children.

Wherefore, the judgment is affirmed.

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Western vs. Pollard.

Case 26.

APPEAL FROM CHRISTIAN CIRCUIT.

ORD. PET.

1. The absence of any stipulation in a note given for the hire of a slave, as to the business about which the slave is to be employed, leaves that fact open to the introduction of parol proof to show how the slave was to be employed. (*Jeffrey vs. Walton*, 1 *Starkie Reports*, 267.)
2. To instruct a jury that "evidence of conversations between the witness and the party alone, uncorroborated by other proof or circumstances, was the weakest testimony held competent by law:" Held, to be improper, and a cause of reversal where there was other corroborating evidence and circumstances.
3. The fact that the hirer of a slave saw him in the performance of a particular kind of service, without objection, tended to show that such service was contemplated at the time of hiring.

The facts of the case are stated in the opinion of the court. *Rep.*

Robert McKee for appellant—

The court erred in giving the first instruction to the jury. There were other facts and circumstances proved to corroborate the evidence of the conversations of the plaintiff, and repeated conversations to the same purport, and their weight greatly increased. (*Collyer vs. Langford's adm'r.*, 1 *Marshall*, 237.) Additional force was given to the statements proved by the silence of the plaintiff when he saw the boy employed at the mill.

The second instruction involves the law arising upon a general contract of hiring; it is not thought necessary to remark upon it.

The third instruction, taken in connection with the first and second, is misleading, and should not have been given.

The fourth is arbitrary and erroneous. There was no evidence of a re-hiring, consequently no conclusion should have been based upon a re-hiring. And from the wording of the instruction the jury might

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and would be mislead, by its terms, to find against the appellant, if they believed the slave was employed out of the state. But there is still a more gross error in saying to the jury that the silence and passiveness of the appellee, when he saw the slave employed at the mill in the state of Tennessee, did not amount to an acquiescence in the act of appellant in employing him there. The silence of appellee, under the circumstances, was a pregnant circumstance, not only evidence of acquiescence but of the fact that the slave had been hired for that particular business, and the jury should have been so informed.

The ruling of the court in regard to the admission of parol testimony to show that the boy was hired for the service at which he has employed, was correct.

But, for the reasons suggested, we ask a reversal.

B. & J. Monroe, on the same side—

The recovery in this case is not justified by the evidence for the following reasons :

1. The weight of the testimony clearly shows that the boy was hired with a full knowledge, on the part of the appellee, that he was to be employed about the mill, and at the place where he was employed when he came to his death.

2. It is denied that the business in which the boy was employed was of that hazardous character which should render the appellant responsible. A negro is supposed to have judgment and discretion, and that he will exercise it for his own preservation. (*Swigert vs. Graham*, 7 *B. Monroe*, 663.) This case is analogous to the case under consideration.

The court erred in its instructions to the jury. The first instruction should not have been given because the facts of the case did not justify it; there were corroborating facts and circumstances to sustain the evidence given of the statements of the appellant given to the jury.

The second instruction was misleading. Stress was laid upon the fact that the boy was employed out of the state, in the state of Tennessee, a short distance across the line; such fact constituted no ground for recovery; and moreover the proof showed that appellee saw him there at work, and in presence of the appellant, and signified no disapprobation of it.

A similar objection exists to the fourth instruction.

A reversal is asked.

Morehead & Brown for appellee—

It is urged by appellant that the judgment is not warranted by the evidence. To this we reply, that the jury were the proper judges of the evidence, as well of its weight as of its credibility, and the judge who decided the case thought the jury decided correctly. The rule of law on this subject is plain and well established. It has been well remarked by a learned judge, in speaking of granting new trials because the verdict is contrary to evidence, that the power ought to be exercised with jealous caution, for, adds he, "if we do not agree exactly with the jury we are too apt to overlook their discretion between a plain and a doubtful deviation, and thus to invade the province of the jury." It is not sufficient if the judge might, as a juror, have given a different verdict. On this subject the court is referred to the case of *Randolph vs. Hill*, 7 Leigh., 390.

The merits of the case are with the appellee.—The contract for hire was made in Kentucky; both parties lived in the same place, and the hiring was general. The legal effect of such a hiring is that the slave be employed in such business as involved only ordinary risk of life and health. It could not have been in the contemplation of the parties that the slave should be taken to another state, and there employed in a hazardous business. It was decided in the case of *Seay vs. Marks*, MSS. opinion, *Alabama*, and here filed, that if the hiring be general,

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by which the hirer becomes entitled to employ the slave in any common or ordinary service, and he engages him in a business attended with extraordinary peril, such as could not be presumed to be in the contemplation of the parties at the time of hiring, or hire him to another to be engaged in a hazardous business, and he is killed while thus employed, even by inevitable accident, the owner is entitled to recover. If the slave be improperly employed it is wholly immaterial so far as the rights of the owner are concerned, how the injury or destruction is brought about.

In 8 *Leigh's Va. Reports* it is held that the hirer is bound to use the slave according to the fair understanding of the parties when hired. A slave cannot be hired in Kentucky, and without any agreement to that effect taken to a sugar or cotton plantation in the south. In the case of *Miller, &c. vs. Ballard* the court divided in the opinion, and the effect was the affirmance of the judgment below. But in that case the question was as to what was the fair understanding of the parties resulting from the nature of the hiring. In that case the hiring was on a steamboat—here it was a general hiring, and the effect is determined by judicial construction.

The evidence conducing to prove that the owner saw his slave at the mill, on Red river, and did not object to it, can make no change in the original contract of hiring, besides he did not see him engaged in any perilous employment. The price for which he was hired shows that it was intended he should be so employed.

It is insisted that the judgment ought not to be disturbed.

October 17.

Judge SIMPSON delivered the opinion of the Court.

This action was brought by the owner of a slave to compel the hirer to pay for him on the ground that, by the contract of hiring, the slave was to be employed only in such service as would not expose

him to extraordinary danger or risk of health or life, and that, in violation of this agreement of the parties, the hirer had employed him in rafting or floating saw-logs, a business involving great risk and danger to both health and life, and that the slave, whilst thus employed, was drowned.

The defendant contended that he hired the slave for the express purpose of working at his mill; that such was the agreement and understanding of the parties at the time the contract was made; and that without any negligence or fault on his part the slave was accidentally drowned, whilst engaged in the very service contemplated by the parties at the time he was hired.

The only writing executed at the time of the hiring was a note which was given by the hirer, in the usual form, for the payment of the hire at the end of the year, and which also contained a promise to furnish the slave with usual and customary clothing during the time for which he was hired.

It is contended that this writing contains the contract of the parties, and that parol testimony is inadmissible to enlarge its terms, or to avoid its legal effect.

If the writing can be regarded as containing the contract of the parties, with respect to the manner in which the slave was to be employed during the term for which he was hired, then this doctrine will no doubt apply, and parol evidence of any other agreement inconsistent with it is not admissible.

The only ground, however, upon which such an effect could be given to it, is that the omission to express in it the service in which the slave was to be employed, furnishes conclusive evidence there was no agreement on the subject, and that in the absence of such an agreement by the parties, the hirer is only authorized to employ the slave in such service as slaves are ordinarily engaged in, and which is not attended with extraordinary risk or peril to his life or health.

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1. The absence of any stipulation in a note given for the hire of a slave, as to the business about which the slave is to be employed, leaves that fact open to the introduction of parol proof to show how the slave was to be employed. (*Jeffrey vs. Walton*, 1 *Starkie R.*, 267.)

The writing does not, according to its import, contain the whole agreement of the parties—it merely regulates the time of hiring and the rate of payment. It is not usual in a note for the hire of a slave to state how, or in what manner, the slave is to be employed; indeed we cannot say that it is ever done, and yet slaves are frequently hired for some special and particular employment. The silence of the note on the subject does not, therefore, in our opinion, prove that there was no agreement of the parties with respect to the business at which the slave was to be employed during the time for which he was hired; and as this part of the agreement was not committed to writing it may be proved by parol testimony. This view is sustained by the case of *Jeffrey vs. Walton*, 1 *Starkie's Report*, 267, which was an action brought for not taking care of a horse which the defendant had hired of the plaintiff. At the time of the hiring the following memorandum was made: "Six weeks at two guineas. William Walton, Jun." Lord Ellenborough treated it as a contract incomplete on its face, and admitted parol evidence that the defendant, at the time of the hiring, agreed to be responsible for all accidents. The writing in that case expressed the time of hiring and the rate of payment, but was silent as to the manner in which the horse was to be used, and as to who was to sustain the loss if one should result from accidents, and yet the court held that it was competent for the plaintiff to give in evidence suppletory matter as part of the agreement. The Supreme Court of Alabama seems to have established a different doctrine, (*Nave vs. Barry et al.*, 22 *Alabama Reports*, 382,) and to have held that where the note for the hire is silent as to the manner in which the slave is to be employed, the contract of hiring must be considered as general in its terms, and as only authorizing the bailee to employ the slave in any business to which slaves are ordinarily put, and which is not attended with extraordinary risk or peril to his life

or health. But this is giving an effect to the note to which, in our opinion, it is not entitled, and construing it to embrace that part of the contract which is seldom, if ever, included in it by the parties.

The defendant was allowed, by the court below, to introduce testimony to show that the slave was hired to work at his mill; and that such was the understanding of the parties at the time of the hiring. To establish this fact he proved statements of the plaintiff to the effect that the slave had been hired to him for that purpose; and he also proved that the plaintiff had been at the defendant's mill and saw the slave at work there before he was drowned, and made no objection to his being engaged in that business.

The court, at the instance of the defendant, instructed the jury "that evidence of conversations between the witness and the party alone, uncorroborated by other proof or circumstances, was the weakest testimony held competent by law." This instruction was inapplicable in the present case. There was other proof tending to corroborate the evidence of such conversations. Evidence of conversations which had been held with the plaintiff on two or three different occasions, one of which was deposed to by two witnesses, was introduced upon the trial; and in addition to this the silence of the plaintiff, when he was at the defendant's mill, was relied on as corroborating proof. Under these circumstances this instruction was not only inapplicable, but was misleading in consequence of its tendency to weaken and diminish the force and effect of the defendant's testimony.

The court, at the instance of the plaintiff, also instructed the jury that if the defendant, after the hiring of the slave, employed him in unusual and hazardous services, in which he was lost or killed, and such acts or conduct on the part of the defendant came to the knowledge of the plaintiff, while the slave was so employed, and he remained silent or

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2. To instruct a jury that "evidence of conversations between the witness and the party alone, uncorroborated by other proof or circumstances, was the weakest testimony held competent by law." Held, to be improper, and cause of reversal where there was other corroborating evidence and circumstances.

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3. The fact that the hirer of a slave saw him in the performance of a particular kind of service, without objection, tended to show that such service was contemplated at the time of hiring.

passive, the defendant himself making to plaintiff no communication of what he had done in reference to the said slave, such silence or passiveness under such circumstances, did not amount to an acquiescence in the conduct or acts of the defendant.

The idea which was intended to be presented to the jury by this instruction is not very clear, but as proof had been introduced that the plaintiff had been at the defendant's mill, and had seen the slave at work there, and made no objection to his being thus employed, the instruction must be regarded as applying to this fact, and as containing the proposition that such silence or passiveness on the part of the plaintiff did not amount to an acquiescence in the conduct of the defendant, and consequently did not tend to prove that the slave was hired under an agreement between the parties that he was to be employed in that service. If such be the meaning of the instruction, and we think it must have been so understood by the jury, it was evidently incorrect. The silence of the plaintiff on the occasion referred to, did tend to prove his acquiescence in the act of the defendant in employing the slave at his mill, and also tended to prove that such employment was consistent with the contract of hiring. The only circumstance referred to in the instruction which, if believed by the jury, was to render the silence of the plaintiff so inoperative that it should not be evidence against him, was the failure of the defendant to communicate to him the service in which the slave was engaged. But the necessity of such a communication is not perceived when the plaintiff, the defendant being present, had himself seen the slave at work at the mill, and made no objection on that account to the conduct of the defendant. This instruction was therefore also misleading and erroneous.

Wherefore the judgment is reversed, and cause remanded for a new trial and further proceedings consistent with this opinion.

JUDGES OF THE COURT OF APPEALS.

HON. THOMAS A. MARSHALL, CHIEF JUSTICE.

HON. B. MILLS CRENSHAW,

HON. JAMES SIMPSON,

HON. HENRY J. STITES,

} JUDGES.

DECISIONS
OF
THE COURT OF APPEALS
OF KENTUCKY.

WINTER TERM, 1855.

Commonwealth vs. Shouse, (3 cases.)

Case 1.

APPEAL FROM BOYLE CIRCUIT.

1. A sale of property to be paid for at its fair value, or at more than its fair value, in a certain event of a pending election, and not to be paid for at all, or to be paid for at more or less than its real value, as understood between the parties, in a different event of the same election, is in substance a bet upon the result of the election.
2. It is necessary, in an indictment for betting on an election, that a certain individual would or would not be elected, to aver that the individual was a candidate, or was proposed or voted for for the office.

1st Case—Pending the election for sheriff of Boyle county, in 1854, the defendant sold to Alex. Sneed, Jr., black cloth and trimmings for a coat, to be paid for when George W. Doneghy was elected sheriff of Boyle county.

Case stated.

2d Case—The defendant is charged with selling to Mason Talbott two and a half yards of black cloth, to be paid for when George W. Doneghy was elected sheriff of Boyle county.

3d Case—The defendant is charged with buying of Lewis Mock a sorrel horse, of the value of \$150, at

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the price of \$300, to be paid for when Jacob Goodnight was elected and chosen sheriff of Boyle county.

Demurrers being filed and sustained to each of the foregoing indictments, the commonwealth has appealed to this court.

J. Harlan, Attorney General, for the Commonwealth—

The questions arising in these cases being the same, will be presented together.

The act to prevent the pernicious practice of betting on elections was passed March 6, 1854. (*Ses. Acts, 1853-4, page 72.*) Whether the averments in these presentments are sufficient to bring the cases within the meaning of that act is the question for the court to decide.

Nos. 1 and 2 were sales made, to be paid for when Doneghy was elected sheriff. Is not that one mode of betting on the result of the election? Shouse bets his black cloth against the money of Sneed and of Talbott. If Doneghy was elected Shouse was to be paid for his cloth, otherwise not. The value of the cloth was the stake in each case, and the election determined the result.

No. 3 is a sale by Mock to Shouse, of a horse worth \$150 for \$300, if Goodnight was elected sheriff of Boyle. We have a right to presume that Doneghy and Goodnight were the candidates for the sheriffalty at the election in August, 1854, that being the regular and constitutional period for the election of that officer.

According to adjudications by this court this was, in effect, a bet on the election for \$150. If Goodnight was not elected Shouse would be a gainer to the extent of \$150—the real value of the horse—but if elected Mock would gain the same amount—that is, \$150 over and above the value of the horse.—(*Bevil, &c. vs. Hix, 12 B. Monroe, 140.*) In the case of *Commonwealth vs. Kirk, 3 B. Monroe, 2*, this court say: "Such construction should be given to the stat-

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ute (to suppress betting on elections) as will accomplish the object intended." It is also said, in the same opinion, that "the object of this statute was to protect the right of suffrage, to preserve the purity of the elective franchise, and to secure perfect freedom and impartiality in the exercise of this inestimable right." (Page 1.)

It seems to me, therefore, that all of these cases come within the spirit and meaning of the act referred to, and that the Circuit Court erred in sustaining demurrers thereto.

Bell & Fox for appellee—

The act of the legislature of 1853-4, (*Session Acts*, 72,) provides "that if any person or persons shall wager 'or bet any sum of money, or anything of value, upon 'any election under the constitution and laws of this 'commonwealth, or under the constitution and laws 'of the United States, he or they so offending shall 'forfeit and pay \$100 each, to be recovered by indictment." (*Ses. Acts* 1853-4, page 53.)

The indictment in this case was doubtless intended to be under this statute, but we apprehend is fatally defective in failing to charge facts which amount to an offense embraced by the statute.

The facts charged are that the defendant Mock *did sell* to Thomas C. Shouse a sorrel horse of the value of \$150, and the sum and price of \$300, to be paid *when Jacob Goodnight* should be chosen and elected, on the first Monday in August, 1854, to fill the office of sheriff of Boyle county, at an election to be held on said first Monday in August, 1854, under the constitution and laws of the commonwealth of Kentucky, to choose and elect a citizen to fill the office of sheriff of Boyle county.

Unless the court regard the words "*sell* the horse, *to be paid when* Goodnight should be chosen sheriff," as being equivalent to or synonymous with *bet and wager upon his election*, the indictment must be regarded as fatally defective. We insist that on the face of

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the indictment nothing is charged but a sale, the price of which was to be paid when a particular event happened.

The indictment *fails* to charge that Goodnight *was* a candidate for election, or that he had any competitor, or that any election was held for the sheriffalty at August, 1854, in that county.

Though the Code of Practice dispenses with mere forms, yet it requires still *that acts constituting the offense* should always be charged to make the indictment good.

We insist that no acts are charged which amount to the offense denounced by the statute against betting on elections, and hence that the indictment was rightfully adjudged bad on demurrer, and we believe that the judgment should be affirmed.

These suggestions apply to all three of the cases.

December 5.

Chief Justice MARSHALL delivered the opinion of the Court.

1. A sale of property to be paid for at its fair value, or at more than its fair value in a certain event of a pending election, and not to be paid for at all or to be paid for at more or less than its real value, as understood between the parties, in a different event of the same election, is in substance a bet upon the result of the election.

We have no doubt that a sale of property, to be paid for at its fair value—or at more than its fair value—in a certain event of a pending election, and not to be paid for at all, or to be paid for at more or less than its real value, as understood between the parties, in a different event of the same election, is in substance a bet upon the result of the election; and any variation in the mere form of the transaction, or in the words describing it, will not change the substance of the thing, if it appear that the real effect is intended to be that one party may lose and the other may gain money or property, or the representative of either, according as an election may terminate for or against a particular person, or may result in one way or another. In any such case the transaction, in whatever form it may be clothed, is really a bet upon an election; and if the election be one authorized and protected by the laws, and of which the purity and freedom are of public interest and importance, the transaction, both on the ground of public policy and of statutory inhibition, is illegal, and has, by the statutes of this state, been generally

made penal. But it is not a penal offense, under any statute, to bet that a certain individual will not be elected to a certain office at a certain election, unless he is a candidate for that office, or is voted for to fill it, or is intended or expected to be voted for, or is expected to be a candidate for it. It is not a statutory offense to bet that a man will not be a candidate for a particular office; and unless he be a candidate, or be voted for or proposed, it may not be an offense to bet either that he will or that he will not be elected. There must be an election taking place, or about to take place, in which he is or will be a candidate, or proposed in some way for the choice of the electors.

While therefore we are of opinion that each of these indictments states facts which may show that the defendant made a bet on the election or non-election of a certain individual to the office of sheriff of Boyle county, at the election of 1854, we are of opinion that it is defective in not stating that he was a candidate, or voted for, or in any manner proposed to the electors to be chosen for that office at that election.

Wherefore the judgment in each case is affirmed.

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2. It is necessary in an indictment for betting on elections that a certain individual would or would not be elected, to aver that the individual was a candidate, or was proposed or voted for for the office.

Clark, &c. vs. Finnell, &c.

Case 2.

APPEAL FROM KENTON CIRCUIT.

ORD. PET.

1. An entry of judgment against the defendants will be regarded as a judgment against such only as have been served with process or have appeared.
2. An error in the date, from which interest is to be computed in entering judgment on a note or bill of exchange, or allowing costs of protest, will not be cause for reversal, unless the Circuit Court has refused to correct it on motion.

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3. An answer to an action on a bill of exchange, that the defendant does not admit a certain fact, and calls for proof, or does not admit that he owes the debt sued for, is not a denial, nor sufficient under the Code to put in issue a fact of which the defendant might have knowledge or belief. It is not the denial of any allegation of fact, nor the statement of any matter constituting a defense, (*Code of Practice, sec. 125, 2 and 3 clauses,*) and is therefore bad on demurrer.
4. It is not a valid plea of set off to plead to a suit by the commissioners of the Kentucky Trust Company Bank, appointed to collect the debts and pay the creditors *pro rata*, that the notes received of the company were under par, and defendants suffered a loss without a tender back of the notes, and bringing them into court.
5. Nor is it any ground for injoining a suit for the debt created by the loan of the notes that defendants had parted with the notes, and were sued for their nominal value, and the suit still pending. The court could not rescind the contract without restoring the notes.

The facts of the case are stated in the opinion of the Court. *Rep.*

J. W. Stevenson and J. Harlan for appellants—

Finnell, Kinkead, and Winston, as commissioners appointed by the Judge of the Kenton Circuit Court to wind up the affairs of the Kentucky Trust Company Bank, sued Clark, Robbins, Mack, and Payson, to recover the amount of a bill of exchange drawn by Robbins on Clark in favor of Mack, and by him indorsed to Payson, and by Payson indorsed to the Kentucky Trust Company Bank.

Process issued against Clark, Robbins, Mack, and Payson, and was executed on Robbins and Payson only.

An answer was filed, commencing with the words "The defendants admit, &c." This, according to the repeated decisions of this court, embraces only those who were served with process; but as Mack's name appears in the jurat the answer must be construed as the answer of all of the defendants except Clark.

There is no abatement of the action against Clark, and the court rendered judgment against all of the defendants. A judgment has been rendered against Clark without the service of process, or any appear-

ance for him. This is the first error upon which we rely for the reversal of the judgment.

The answer of Robbins, Mack, and Payson contains three separate and distinct grounds of defense, to each of which the plaintiffs demurred, and the court sustained the demurrer.

If the answer contains any matter of defense the judgment must be reversed.

1. The first ground of defense puts in issue an essential averment of the petition, to-wit, the giving of notice to the drawer and indorsers of the non-payment of the bill. The answer denies the allegation in these words: "They do not admit the regular protest thereof, or that due notice of said protest was given to said drawer and indorsers thereof, as charged in said petition, and require proof thereof."

It seems to us this was intended and does put in issue the fact of the service of notice; and without proof of notice to the drawer and indorsers no recovery could be had.

The second and third grounds, when taken together, present an equitable defense and set-off for a very large proportion of the amount claimed.

The condition of the bank at the time the bill in question was purchased, must have been known to its officers, and that knowledge made it certain the bank must fail in a very short time. The demurrer admits the agreement that the bills of the bank received for the bill of exchange were to be put into circulation in Mason county, Virginia. Of the sum received \$3,796 were paid out there by the agents of defendants, the 19th of October, 1854, the day after the failure of the bank. But the probability is the agent will be compelled to refund the money. In addition, the balance of the proceeds of the bill were sold in the market at a loss of \$2,170 04. Now, in a court of equity—to which docket the Circuit Court of Kenton should have transferred this case—are not the defendants entitled to relief? Between individ-

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uals what would be the judgment of a court of equity upon the admitted facts? Certainly the holders of a bill of exchange, obtained under the circumstances, would not be permitted to collect the whole amount thereof in gold or silver, or its equivalent. A corporation should not have greater or more extensive liberties, in a court of justice, than an individual.

The mere fact that the chancellor has appointed commissioners to wind up the affairs of the bank cannot change the legal rights of the parties. Whatever equity the defendants possessed existed at the date of the chancellor's order, and that equity is by no means impaired by the order.

If there were no other valid grounds for reversal the manner of rendering judgment is sufficiently erroneous—

1. The bill is dated 6th October, at thirty days; allowing three days of grace the bill became due the 8th November, and that is the day it was protested for non-payment, yet interest is given from the 6th, thereby giving two days too much interest. In buying bills of exchange the banks always include the days of grace; and they retained or rather deducted the amount of interest, including the days of grace in this case.

2. The petition claims \$—— costs of protest. The court rendered judgment for seventy-five cents for costs of protest, without allegation, or evidence, or any indorsement on any paper, showing that plaintiffs were entitled to it. The same principle applies in a matter of seventy-five cents as if it were seventy-five dollars.

The circuit court refused permission to amend the answer. That amendment proposed to put the plaintiffs on proof of their cause of action—for example, suppose under the old system the plaintiffs had sued in *assumpsit*, they would have been compelled to prove the signatures, &c., of the defendants. In this case the execution of the bill is not denied, but the

defendants denied having received notice, and the amendment they proposed to make was a conclusion from that fact.

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Morehead & Brown and W. B. Kinkadee for appellees—

The first paragraph of the answer is clearly insufficient under the Code of Practice, (section 125.) It is a mere denial of the indebtedness charged, and a refusal to admit the regular protest of the bill—not a denial of notice, but only a refusal to admit.

The second paragraph is not an averment of tender to the commissioners of the money of the company; it is only pretended that a part of the paper borrowed was not disposed of, but brought back to be handed to the commissioners, but they refused to refuse to receive it.

This paragraph presents no valid defense to the action. The fact averred that they had parted with a portion of the notes, and were liable and actually sued for them, is not available, in this suit, as a defense.

The third paragraph is equally defective as a defense. It alleged that the bank was in failing circumstances, and that the defendants were defrauded. The facts to constitute fraud are not set out. The notes issued were payable on demand, and might immediately have been returned to the bank. The arrangement which is averred, that the notes would be circulated in Mason county, Virginia, was not legally binding, and could not justify the bank in refusing to redeem the notes on demand. The answer does not show that the defendants passed off the notes after the bank failed, and that they are liable to redeem them.

They do not tender back the notes received, and cannot ask a rescission of the contract of loan.

The judgment of the court sustaining the demurrer to the answer was correct.

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December 5.

Chief Justice MARSHALL delivered the opinion of the Court.

Finnell, Kinkead, and Winston, commissioners appointed by the Kenton Circuit Court to close the affairs of the Kentucky Trust Company Bank, under the 3d section of an act to amend the charter of said bank, approved January 2, 1852, (*Session Acts*, 14,) brought this action by petition against Clark, the acceptor, Robbins, the drawer, and Mack and Payson, indorsers, of a bill of exchange for \$7,321 40, dated at Cincinnati, October 6, 1854, payable thirty days after date, at the Mechanics' Bank of New York, and addressed to Clark at the New England Bank, Boston, Massachusetts. Process upon the petition was served upon Robbins and Payson alone, but Mack united with them in filing an answer sworn to by these three, and a demurrer having been sustained to each paragraph of the answer, judgment was rendered against the defendants without naming them, for \$7,321 40, with interest from the 6th day of November, 1854, and for seventy-five cents, the cost of protest, together with the costs of the suit.

1. An entry of judgment against the defendants will be regarded as a judgment against such only as have been served with process, or have appeared.

From this judgment Clark, with the other defendants, has appealed; and it is objected that judgment was rendered against him without service of process or appearance. But according to the decisions of this court there is no judgment against Clark—the word defendants being understood to apply to those defendants only who had either appeared or been served with process. And there is nothing in the entries made in this case to repel or weaken this construction. There is therefore no error in this respect.

2. An error in the date from which interest is to be computed in entering judgment on a note or bill of exchange, or allowing costs of pro-

The error in the judgment of giving interest from the 6th instead of the 8th of November, if it be one, might have been corrected by motion in the Circuit Court. The date of the protest exhibited with the petition is the only evidence that three days, or any other number of days of grace are allowed in New York for the payment of bills. If it was erroneous

to render judgment for seventy-five cents as the cost of protest, when no sum is specified in the petition, that error might have been corrected on motion, and cannot be moved in this court for the first time. But although there is a blank in the petition, as to the amount of the cost of protest, there is a claim for it, and the Court may have heard evidence on the subject.

The material questions, however, arise on the demurrer to the answer. The first paragraph says the defendants do not owe, and ought not to pay, the amount of the bill, "*for they do not admit the regular protest thereof, and notice, &c.,*" as charged in the petition, and require proof, &c. This paragraph of the answer is clearly insufficient under the rule prescribed by the 2d and 3d clauses of section 125 of the Code. It neither sets forth new matter, as allowed by the 3d clause, nor contains a denial of any allegation contained in the petition, nor of any knowledge or information thereof sufficient to form a belief. That the defendants do not admit a certain fact, and call for proof, &c., is not a denial, nor sufficient, under the Code, to put in issue a fact as to which the defendants might have knowledge or belief. The general statement that the defendants do not owe, when the petition merely states the facts from which indebtedness or liability is implied by law, is no proper response to the petition, because it neither denies any allegation of fact, nor states any new matter constituting a defense. But if it were allowed to be good in analogy to the plea of *nil debit* or *non assumpsit*, it might authorize a defense to be made, in the evidence of which there was no indication in the answer. And the object of the Code is that the pleadings shall state facts, and not mere implications of law. The court, therefore, properly sustained the demurrer to the first paragraph of the answer, and for the same reasons it properly rejected the proposed amendment, which in form and substance was nothing but a plea of *nil debit*.

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test, will not be cause for reversal, unless the Circuit Court has refused to correct it on motion.

3. An answer to an action on a bill of exchange that the defendant does not admit a certain fact, and calls for proof, or does not admit that he owes the debt sued for, is not a denial, nor sufficient under the Code to put in issue a fact of which the defendant might have knowledge or belief. It is not the denial of any allegation of fact, nor the statement of any matter constituting a defense, (Code of Prac. sec. 125, 2 and 3 clauses,) and is therefore bad on demurrer.

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The second and third paragraphs state in substance that the defendants received from the bank its own notes in purchase of the bill, and under an agreement that they were to circulate the notes in the county of Mason, in the state of Virginia; that at the time the bank, (or its officers,) knew, but the defendant did not know, that the bank was in a failing condition; that soon afterwards, (on the 18th of October, 1854,) the bank refused payment of its notes, &c., and still refuses; that about the 19th of the same month the agents of the defendants, in the said county of Mason, then ignorant of the failure of the bank, used a specified amount, (between three and four thousand dollars,) of said notes in payment of hands in the employ of defendants. And the second paragraph states that the residue of said notes, the amount being named, were handed by them to the commissioners soon after their appointment, but refused by them, and the defendants afterwards sold them for the best price they could obtain, and got for them only about \$1,300; and they claim as a set-off against their liability on the bill the difference between the sum obtained and the nominal amount of the notes sold, and also twelve per centum damages on said nominal amount, as due by the charter, on account of the refusal of the bank to pay the same. The third paragraph states that the persons to whom the notes had been paid in Mason county, Virginia, had, upon being informed of the failure of the bank, brought suit to recover their demands as if unpaid by the defendants, who, as they feared might, by the event of said suit or suits, which are still pending in Virginia, be compelled to pay said demands in good money; and they pray that proceedings in the present case may be suspended, or judgment enjoined, until the decision of said suit or suits in Virginia, and if the decision should be against them, that the amount of said notes passed in payment in Mason county, Virginia, and also twelve per centum damages there-

on may be set-off against the demand set up in the petition.

The 2d paragraph, which claims an immediate set-off for the loss on the notes sold, and for twelve per cent. damages, is fatally defective not only in failing to produce and tender the notes prayed to be set-off, or any of them, but in showing that the defendants have voluntarily parted with them for a valuable consideration, and have thus deprived themselves at once of the ability and the right to use them as a set-off. Besides, the amended charter before referred to, provides that in case the bank should fail to pay its notes, &c., its debts shall be collected and paid *pro rata* to its creditors. We are not prepared to say that it would be consistent with the object and terms of this provision to allow a set-off for notes of the bank actually in the hands of its debtors, beyond the ascertained *pro rata* share properly distributable upon the same notes; and it does not appear that any dividend has been made or is due, or that there has been or can now be any ascertainment of the distributable fund. But it is not necessary to decide the general question of set-off under this statute. It would be clearly inconsistent with the provision to allow twelve per centum damages on notes, even formally presented for payment to the commissioners appointed to close the concerns of the bank, by collecting and realizing its assets, and making *pro rata* payment of its debts. The answer, however, does not allege a demand of payment, but merely that the notes were handed to the commissioners, who refused to receive them. There was no error in deciding this paragraph to be insufficient.

The 3d paragraph, so far as it claims a future set-off, is subject to substantially the same objections as the second; and so far as it asks for an injunction until a suit in another state shall be decided in order that the defendants may know whether they will have a claim against the bank, for its notes which they have passed into other hands, in the way of

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4. It is not a valid plea of set-off to plead to a suit by the commissioners of the Kentucky Trust Company Bank, appointed to collect the debts and pay the creditors *pro rata*, that the notes received of the company were under par, and defendants suffered a loss without a tender back of the notes, and bringing them into court.

5. Nor is it any ground for joining a suit for the debt created by the loan of the notes that defendants had parted with the notes, and were sued for their nominal value.

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vs.
ADAMS.

and the suit still
pending. The
court could not
rescind the con-
tract without re-
storing the
notes.

their business, is unreasonable, and, as we suppose, unprecedented. The defendants have put it out of their power to rescind the contract on the ground of fraud, and if the fraud were sufficiently shown they have not shown that they were wholly without fault in circulating the notes received from the bank, and thus putting it out of their power to restore them. Nor does it appear that they might not, at their own discretion, by re-payment or otherwise, re-possess themselves of the notes paid by their agent in Virginia, and thus enable themselves to restore the notes on a rescission.

We are of opinion that the demurrer to the third paragraph was properly sustained, and no sufficient answer having been offered it was proper to render judgment against the defendants.

Wherefore the judgment is affirmed.

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Commonwealth vs. Adams.

Case 3.

APPEAL FROM PIKE CIRCUIT.

INDICTMENT.

1. Appeals from judgments of the Circuit Court in cases of misdemeanors must be taken at the term at which the judgment is rendered. (*Crim. Code, sec. 343.*)
2. The record must be filed in the clerk's office of the Court of Appeals *within sixty days after the judgment*. No summons is necessary.
3. If the record, in cases of appeal from a judgment for misdemeanor be not filed within sixty days after the judgment, the Court of Appeals cannot take jurisdiction of the case.

The facts of the case are stated in the opinion of the Court. *Rep.*

J. Harlan, Attorney General, for appellant—

December 5.

Judge STILES delivered the opinion of the Court.

This is an appeal by the commonwealth from a judgment of the Circuit Court acquitting the appellee of a charge of permitting gaming upon premises

under his control and in his occupation, the penalty for which offense is not less than two hundred nor more than five hundred dollars. The prosecution was begun since the Criminal Code went into effect. The judgment seems to have been rendered at the May term, 1855, of the Circuit Court, and exceptions signed, and appeal prayed on the 19th May, 1855.

The record does not appear to have been filed in the clerk's office of this court until the 7th day of September, 1855.

By the second article of the Criminal Code, regulating appeals in misdemeanors, section 343, it is provided that "the appeal shall be prayed during the term at which the judgment was rendered, and shall be granted *upon the condition* that the records is lodged in the clerk's office of the Court of Appeals *within sixty days* after the judgment."

In section 345, same article, it is provided that "when the Commonwealth's Attorney prays an appeal, the clerk shall forthwith make and certify a complete transcript of the record, and transmit the same to the Attorney General, or deliver it to the Commonwealth's Attorney for that purpose; and if the Attorney General, on inspecting the same, believes it proper to take the appeal, he shall do so by filing the transcript in the clerk's office of the Court of Appeals *within sixty days* after judgment." And in section 346, "no summons is necessary on an appeal."

The first section of the Criminal Code declares that it shall regulate the proceeding in all prosecutions and penal actions after the 1st July, 1854.

The third section expressly repeals all laws coming within the perview of the Code when it takes effect, except those that apply to cases commenced before the 1st September, 1854. So that the only mode prescribed and in force for prosecuting appeals in misdemeanors, arising since the 1st July, 1854, and applicable to the present case, is contained in the Criminal Code.

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1. Appeals from judgments of the Circuit Court in cases of misdemeanors must be taken at the term at which the judgment is rendered. (*Crim. Code, sec. 343.*)

2. The record must be filed in the clerk's office of the Court of Appeals *within sixty days* after the judgment. No summons is necessary.

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vs.
EMBRY.

This has not been complied with, in failing to file the record within sixty days after the judgment, and this court cannot now take jurisdiction of the case. Wherefore, the appeal is dismissed.

Case 4.

Taylor vs. Embry.

ORD. PWT.

APPEAL FROM MADISON CIRCUIT.

1. A slave is incapable of holding property, or receiving the title to property, in any degree; and a devise of property to a slave is void, as is a devise to another for the benefit of a slave, and passes no title to the slave.
2. The devise to a slave being void the property passes to heir at law, (1 *Statute Law*, 596,) and such heir may sue and compel a release of title from one asserting right under such void devise. (*Ses. Acts*, 1853-4, page 149.)

December 7.

Judge STILES delivered the opinion of the Court.

1. A slave is incapable of holding property or receiving the title to property in any degree; and a devise of property to a slave is void, as is a devise to another for the benefit of a slave, and passes no title to a slave.

A slave cannot hold property, neither can he take or hold the right of property in any degree. He is incapable of receiving or holding property, or the right to property, under a devise or bequest; and any devise or bequest to him, except that of freedom, is void; so a devise in trust, for the benefit of a slave, is also void, for a devise of property in trust for the benefit of a slave is substantially a devise to the slave, and, as he is incapable of taking the benefit, the trust cannot be enforced. Besides such beneficiary devise to a slave is equally at variance with the policy which forbids him holding property.—(*Graves vs. Allen*, 13 *B. Monroe*, 192.)

2. The devise to a slave being void, the property passes to heir-at-law, (1 *Stat. Law*, 596,) and such heir may sue and

The devise in this case to Embry, for the benefit of Joe Traveller, his slave, is therefore void, and no interest passed by it to the trustee nor the beneficiary. And the testator having no children or other relations that were free, and could take by inheritance, his wife, under the statute of descents in force at the

time of his death, (1st vol. *Stat. Laws*, 596,) was his sole heir-at-law, and as such entitled to the whole of his estate.

She being thus entitled to the land in question, and in possession thereof, had the right under the statute, (*Ses. Acts*, 1853-54, page 149,) to file her petition in equity against Embry to quiet any claim he set up under the will, as devisee in trust for his slave. Embry, in his answer, instead of disclaiming title, and offering to release, as required by the statute, says he is advised that the devise is valid, and declares his intention, if living, at the proper time, to set up right thereunder. This declaration was of itself sufficient, without other proof, to entitle the appellant to a decree for a release from Embry, and in our opinion, the court erred in refusing it.

Wherefore, the judgment is reversed, and cause remanded for a judgment and other orders in conformity with this opinion.

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compel a release of title from one asserting right under such void devise. (*Sess. Acts*, 1853-4, p. 149.)

Elliot vs. Threlkeld.

Case 5.

APPEAL FROM SHELBY CIRCUIT.

ORD. PTY.

1. In a suit by an assignor of a note, which the assignee has failed to recover from the obligor, it is necessary to set out the consideration of the assignment.
2. The plaintiff should also state the reason why the amount was not recovered from the obligor.
3. If the assignor be party to the suit in favor of the assignee against the obligor, he is bound by the decision, and cannot controvert it in a suit by the assignee against him to recover the amount paid for the assignment.

The facts of the case are fully stated in the opinion of the court.—*Rep.*

ELLIOT
vs.
THRELKELD.

Brown & Whitaker for appellant—

Argued—1. That the Circuit Court erred in overruling the demurrer to the plaintiff's petition. It is not alleged that any consideration was paid for the assignment, which is indispensable to show cause of action. The plaintiff must show a complete cause of action by the statement of such facts, as if admitted to be true shows a right of recovery, and for what that recovery should be had. It is a well established rule of pleading that in all cases where an implied contract is relied upon, a consideration must be alleged for the undertaking. The same rule applies to actions on parol contracts. The obligation of the assignor to refund the consideration paid by the assignee is an implied promise, and it is necessary to aver the consideration of the assignment. The defect in this case is not remedied by an exhibit of a copy of the assigned note, purporting to be an assignment *for value received*.

2. The petition does not show the exercise of proper diligence in prosecuting suit against the obligor in the assigned note.

3. The court erred in sustaining the demurrer to the answer of the appellant. The answer averred lack of diligence in bringing and prosecuting the suit on the note, and in defending the suit in chancery, and by such delay and lack of diligence appellant is injured. Bean and Mount should also have been parties to the suit in chancery. (See *Code of Practice, sections 34, 35, and 40.*)

4. The judgment is for too much. In no event should it have exceeded seventy-five dollars, with interest from 11th July, 1849, and the costs expended by Threlkeld in the litigation.

J. M. & W. C. Bullock for appellee—

The first question presented is upon the sufficiency of the petition of the appellee, to which the demurrer was overruled. The petition and exhibits filed show—1. That the note was assigned before it fell

due ; that suit was brought at the first term of the court thereafter, and judgment recovered, and within ten days after judgment execution was issued, which was stayed by injunction, and in 1854 the injunction was perpetuated ; that the plaintiff was compelled to pay \$116 75 on the 24th February, 1855. We rely that the petition and exhibits, as parts thereof, do show a valid cause of action.

2. The record shows a vigilant prosecution of the claim, and no lack of diligence on the part of appellee. If the note was given for land, as clearly appears, and the payee had no title, and there was a failure of consideration, no suit was necessary upon the note, but the assignor might have been sued forthwith, and compelled to refund the consideration. (*Maupin vs. Compton*, 3 *Bibb*, 25.) The note which was assigned to appellee was given for land to which the obligee never could make title. This fact has been legally adjudicated and established. (*Scott vs. Cleveland*, 3 *Monroe*, 62) The appellant was party to that suit, and cannot now re-litigate the questions there decided, and as the answer attempted to set up such a defense it was rightly held insufficient.

Judge SIMPSON delivered the opinion of the Court.

The plaintiff's petition was defective, and the demurrer to it should have been sustained. The consideration of the assignment should have been set forth, as the plaintiff could not recover against his assignor unless the assignment had been made for a valuable consideration, and then he could only recover the sum actually paid by him, with interest thereon, and not the full amount of the note unless the consideration paid was equal to it. The petition merely states the assignment and refers to it, and is wholly silent as to the consideration upon which it was made. The assignment on the note purports to have been made for value received, but this cannot cure the defect in the petition, because a statement in

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1. In a suit by an assignor of a note which the assignee has failed to recover from the obligor, it is necessary to set out the consideration of the assignment.

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2. The plaintiff should also state the reason why the amount was not recovered from the obligor.

3. If the assignor be party to the suit in favor of the assignee against the obligor, he is bound by the decision, and cannot controvert in a suit by the assignee against him to recover the amount paid for the assignment.

the petition itself, that the assignment had been made for a valuable consideration, would not have been sufficient. The nature and amount of the consideration must be stated.

The petition should also have stated the reason why the payment of the note by the obligor could not be enforced by the assignee, instead of merely referring to the record and proceedings of the suit, in which the obligor was released from its payment; and if the plaintiff relied upon the judgment in that suit as conclusive upon the defendant, he should have alleged that he was a party to it.

The matters relied upon by the defendant in his answer did not constitute a good defense to this action; as he was a party to the action which was instituted by the maker of the assigned note to be relieved from its payment, he is bound by the proceedings and judgment in that case. It was as much his duty, as that of any of the other parties to it, to defend that action. He was interested in the result, and had a right to have set up and relied upon the very matters which he now contends should have been therein insisted on. If the judgment be wrong he can prosecute an appeal, but so long as it remains in force and unreversed it is obligatory upon him, and cannot be collaterally impeached by him, either on the ground of fraud and collusion in its obtention, or because it was unauthorized by the testimony, and is therefore erroneous.

But although the defendant's answer was insufficient, yet as the petition was defective, and did not set forth a good cause of action against him, he has a right to complain of the judgment, which, for this reason, is erroneous.

Wherefore the judgment is reversed, and cause remanded with directions to sustain the demurrer to the petition, and for further proceedings consistent with this opinion.

Raymon
vs.
Reed.

Raymon vs. Reed.

Case 6.

APPEAL FROM NICHOLAS CIRCUIT.

ORD. PET.

1. A suit was brought in the county of defendant's residence; process issued to that county and an adjoining county, and served in the latter county in time for judgment, but not in the county of defendant's residence in time for judgment: Held, that it was error to render judgment upon the service in the foreign county. (*Code of Practice, chap 5, secs. 107, 110.*)
2. The defendant having objected to the judgment, and the court overruling his objection, it was proper to bring the case up for correction of the judgment; but if the court had not decided the question in that form it would have been necessary to have moved the court for its correction, as a clerical misprecision, before bringing the case to this court.

The facts of the case are stated in the opinion of the court. *Rep.*

T. E. Quisenberry for appellant—

The court below erred in rendering judgment against the appellant. By the *Code of Practice, chapter 5, section 107*, it is expressly declared that where the action is against a single defendant the plaintiff shall not be entitled to judgment unless the defendant is served with the summons in the county in which the action is brought, unless the defendant appears and fails to object for the want of proper service. If the defendant does appear and objects, as was done by appellant in this case, the court shall not render judgment. According to *section 10, chapter 5, of the Code of Practice*, it is provided that a summons served out of the county in which the suit is brought is good whenever the defendant, residing in the county where the suit is brought, removes to another county; in such case the summons may follow the defendant, and service out of the county in which the action is brought has the same effect as if served in the county where the suit is commenced.

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vs.
REED.

In no other case is service good out of the county where the suit is commenced.

In the case of *Pottinger vs. Mayfield*, 14 B. Monroe, 647, this court decided that where there are several defendants there must be service of process on some one of them, or some one of them must reside in the county where the suit is brought.

The defendant, now appellant, was attending the Bourbon Court as a witness, and could not have been sued there. See *proviso of section 603 of the Code.*) He was not absconding or concealing himself; if such had been the case the appellee could have had his attachment. (See *sec. 88, art. 2.*)

The objection to the judgment was duly made and decided by the court below, and it is now asked that this court correct that error of the circuit court.

F. Munger for appellee—

Raymon resided in Nicholas county, where this suit was brought; he resided there when the judgment was rendered. He objected to the judgment, but the court overruled his objection under the authority of *section 107, chapter 5, of the Code of Practice.* *Section 106* provides that "every other action may be brought in any county in which the defendant resides or is summoned," which embraces this case. *Section 107* says: "Where any action embraced by the last section is against a single defendant the plaintiff shall not be entitled to judgment against him, on the service of a summons in any other county than that in which the action is brought, unless he resided in that county at the commencement of the action." Therefore, if the defendant resided where the action was brought, judgment may be rendered; for if suit *may* be brought where defendant resides judgment *may* be rendered, as well as in cases where suit *must* be brought in certain counties, judgment may be rendered, although the summons is executed in another county.

RAYMON
vs.
REED.

The case of *Pottinger vs. Mayfield*, 14 B. Monroe, 647, is relied on to show that where one of several defendants is served with process out of the county where the suit is brought, and another defendant resides in the county where the suit is brought, that judgment may be rendered against the defendant served out of the county. The principle there settled is the same as that involved in this case.

The 10th section of the Code, chapter 5, recognizes as valid the service of process in any county provided the defendant resides in the county where the suit is brought when it is commenced. The same effect is given to the service as if in the county where the suit brought. What is the meaning of this language? It is believed it has reference to the time when the party must answer, &c.; to the time of trial, &c. It would be giving the language an effect beyond its meaning to say it restricted the meaning of sections 106 and 107.

J. Harlan on the same side—

The determination of the question in this case depends upon the construction which the court may give to the provisions of Code of Practice, title V, entitled, "The county in which an action may be brought."

The first section supposed to be applicable is section 106, which reads: "Every other action may be brought in any county in which the defendant, or one of several defendants resides or is summoned."

As there is but one defendant in this case the words "or one of several defendants" should be omitted, and the section will then read: "Every other action [which includes this] may be brought in any county in which the defendant resides or is summoned."

The order—which was intended for a bill of exceptions—states that the defendant resided in the county of Nicholas at the commencement of the action, and still resides there. I submit whether the

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case is not within the very letter of the section, and also within its spirit. By serving the process on Raymon in the county of Bourbon it did not, in anywise, prejudice his rights of defense. The purpose and object of the Code was to prevent a debtor from avoiding the process of the court of the county of his residence by going into another county, and returning within ten days before the commencement of the term of the court, and thus prevent honest creditors from obtaining judgments for their money.

The construction for which I contend is fortified and sustained by the two following sections, 107 and 108:

Section 107 is to the effect that the plaintiff shall not be entitled to a judgment on the service of a summons in any other in which the action is brought, *unless he resided in that county at the commencement of the action.* The meaning of which is, if he resided in the county in which the action was commenced, and was served in another county in proper time, the plaintiff shall be entitled to a judgment.

Section 108 is applicable to a case where there are several defendants, and no judgment shall be rendered unless one of the defendants was *summoned* in the county where the action is brought, or *resided* there at the commencement of the action; but if either exists the plaintiff shall be entitled to a judgment.

Section 110 is and was intended to embrace the 3d section of the act of February 4, 1812. (1 *Mowhead & Brown*, 342.)

That act and section 110 authorizes process to be sent to any county in the state where the defendant *removes* from the county in which the action is brought after the commencement thereof. This section does not apply to the present case, but the previous sections were intended to extend the facilities of obtaining judgments against defaulting debtors, in cases where no defense would be interposed.

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REED.

Residence of the defendant gives jurisdiction to the court. The sections referred to do not require both residence and service of process in the county in which the action is brought. Service in any county is good if the defendant *resided* in the county where the action is brought. If the defendant is sued in a county in which he does not reside a service of process in that county will authorize a judgment. I refer to the case of *Pottinger vs. Mayfield*, 14 B. *Monroe*, 610, as sustaining the construction contended for.

The sections referred to by the court in that case were taken from the first edition of the Code, but are the same referred to in this brief but have different numbers.

Judge CRENSHAW delivered the opinion of the Court.

December 10.

This suit was brought against Raymon by Reed in the Nicholas Circuit Court, where Raymon resided, upon a note executed by Raymon for \$2,231 25. Process was issued to the county of Nicholas, and also to the county of Bourbon; each summons was executed; the one which issued to Bourbon was served more than ten days before the ensuing term of the Nicholas Circuit Court, but the one which issued to Nicholas was not served in time for a judgment at the next Court.

Upon the calling of the cause at the ensuing term the defendant appeared and showed that he resided in the county of Nicholas at the institution of the suit, and still resided there, and that he was attending the Bourbon Court as a witness when the summons was executed in that county; and he objected to the rendition of the judgment against him, but the court overruled his objection, and gave judgment against him.

The question is, was the judgment properly rendered upon the service of the process in Bourbon—that served in Nicholas not being in time for a judgment at that term?

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vs.
REED.

1. A suit was brought in the county of defendant's residence; process issued to that county and an adjoining county, and served in the latter county in time for judgment, but not in the county of defendant's residence in time for judgment: *held*, that it was error to render judgment upon the service in the foreign county. (*Code of Prac. chap. 5, secs. 107, 110.*)

2. The defendant having objected to the judgment, and the court overruling his objection, it was proper to bring the case up for correction of the judgment; but if the court had not decided the question in that form, it would have been necessary to have moved the court for its correction, as a clerical misprison, before bringing the case to this court.

The law applicable to this question is found in the Code, *title V, sections 107 and 110*. These two sections are upon the same subject, and must be construed together. And although a literal construction of section 107, without a consideration, at the same time, of section 110, might authorize the conclusion that service of process upon the defendant in another county than that in which the suit was brought—the latter being the county of his residence—yet, when these two sections are considered together, we think the conclusion is clear and indisputable that the commencement of the suit in the county of the defendant's residence, and the service of process in another county, will not authorize the judgment, unless the defendant had *removed* from the county of his residence after the commencement of the suit therein, which it is not pretended he did. Any other construction would render section 110 entirely nugatory and unmeaning.

After the appearance of the defendant we think the judgment against him would have been authorized had he failed to object to the same; but he appeared and objected.

Had there been no appearance to the action the judgment would have been regarded as premature, and a clerical misprison, and no appeal to this court would have been authorized until the Circuit Court had refused, upon motion, to set aside the judgment. But the defendant having appeared and objected to the rendition of judgment, and the court having decided upon its propriety, the error is an error of the court, and not a mere clerical misprison.

Wherefore the judgment is reversed, and the cause remanded with directions that the judgment be set aside, and for further proceedings.

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vs

NESBITT, &c.

Finnell, &c., vs. Nesbit, &c.

Case 7.

APPEAL FROM KENTON CIRCUIT.

PET. EQ.

One who is a debtor to a bank, the funds of which are placed in the hands of commissioners for liquidation, may properly claim a set-off for anything due to him from the bank at the date of the assignment. (3 *Dana*, 398.)

This suit was brought by the commissioners of the Trust Company Bank, on a bill of exchange which the bank held upon Nesbit as drawer, Scott as acceptor, and Goodson as indorser. Case stated.

The petition sets forth the bill in the usual form. The failure of the bank in October, 1854, and the appointment of the commissioners by the chancellor on bill filed, and asks judgment for the amount of the bill.

Nesbit answered admitting the execution of the bill, but says that previously to the failure of the bank he deposited in its office \$258 75 as a fund out of which he proposed to pay off and discharge the said bill; that previously to the failure of the bank, and before any bill filed to compel a liquidation of the affairs of the bank, he presented his check for the amount of said bill and in payment thereof, but the bank refused his check, all which was before the bill was due; that said sum of \$258 75 has never been paid to him and is yet due, and claims to set-off that sum against the bill sued on, and judgment over for the remainder after satisfying the bill.

To this answer there was a demurrer, which is presumed to have been overruled, though the record does not show it in terms.

The plaintiff filed a reply, denying that Nesbit made his deposit with the intention of paying the bill, but that the deposit was made with the intention and under an agreement that it should draw interest at six per cent., and averring that it was made before

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the bill was drawn. To this reply there was a demurrer which the court sustained, and gave judgment for the defendant. The plaintiff excepted, and has appealed to this court.

W. B. Kinkad for appellant—

The amount in contest is small, though the principle involved is an important one for the guidance of the commissioners in settling the affairs of the company.

The circuit judge was not authorized to conclude that the deposit was made by the appellee with the intent to pay the bill sued on, as it was made before the bill was drawn, and the appellee does not say so; his allegation is that out of his deposit he *proposed* to pay the bill.

This is not a case of *mutual* credit between parties. The debt did not arise out of the same transaction; no connection between the demands, nor agreement for a set-off, but a case of separate and distinct demand for which each party has his separate right of action. (See *Barbour on Set-Off*, 17; *Parsons on Con.*, 240; *Jacobs' Law Dic.*, vol. 6, p. 66.)

The common law, differing from the civil law, drove each party to his separate suit. It is by statute alone that it is allowed, which gave the party a discretion to rely upon the set-off or resort to his separate suit; but if relied upon as set-off it must be plead with notice, otherwise it could not be given in evidence. The balance of the account was then considered as the true debt between the parties.

By sec. 128 of the *Code of Practice* "a set-off must be a cause of action arising on contract, or ascertained by the decision of a court." But it is insisted this case is to be tested by the charter of the bank. By that charter it is provided, in substance, that upon the refusal of the bank to pay its notes or deposits, the circuit court of Kenton county, upon petition being filed by a citizen of this state, shall appoint commissioners who shall take possession of its as-

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sets, collect the same, and apply them by a *pro rata* distribution among the creditors of the bank according to their respective demands. These provisions are thought to be in conflict with the general law of set-off, and must prevail.

Was the bill sued on a part of the assets of the bank? It is insisted that it was.

But the circuit judge supposed that the right of set-off existed; that courts of equity would grant relief in cases where a court of law would, and that the chancellor in this case would allow a set-off, the bank charter notwithstanding. If the charter of the bank would not admit the defense here set up at law, it could not be applied in equity. (*Jackson, &c. vs. Robinson, &c.*, 3 *Mason*, 183.)

Story says (*Story's Eq.*, sec. 1434,) "Equity generally follows the law as to set-off, but it is with restrictions and limitations. If there is no connection between the demands, then the rule is as it is at law."

In *Howe v. Shepherd*, 2 *Sumner*, 412, Judge Story said in regard to set-off, "The known rule in equity in regard to set-off is, that they follow the law unless there is some intervening natural equity going beyond the statute of set-off, which constitutes the general basis of set-off at law;" also, 2 *Sumner*, 634, "To justify a court of equity in allowing a set off, there must be some original intervening equity between the parties besides the mere fact of mutual debts." (5 *Mason*, 201.)

Before the statute of bankruptcy in England (5 *Geo* 2) a creditor was compelled to prove his debt before the commissioner, and take his *pro rata* dividend of perhaps 2s and 6d in the pound, and at the same time pay the full amount of his indebtedness to the bankrupt's estate. (*Ex parte, Prescott's case*, 1 *Atk. R.*, 231, *per Hardwicke*.)

Such it is insisted is the effect of the charter in this case. The appellee, as a depositor, is not entitled to any preference over other creditors, and the commissioners should be allowed to collect the

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amount of the bill as assets for a *pro rata* distribution according to the provisions of the law.

Menzies & Spilman for appellee—no brief found.

December 11.

Judge SIMPSON delivered the opinion of the Court.

One who is a debtor to a bank the funds of which are placed in the hands of com'rs for liquidation, may properly claim a set-off for anything due to him from the bank at the date of the assignment. (5 *Dana*, 398.)

If this action had been brought in the name of the Trust Company Bank, the right of the defendant to a set-off would be clear and undoubted. The only question then that arises in the case is, whether the provisions of the charter, and the transfer of the effects of the corporation into the hands of commissioners in pursuance thereof, operates to divest this right, or whether it still continues notwithstanding this transfer, inasmuch as the demand on which it is founded was due to the defendant during the legal existence of the corporation. If it had been acquired by him after that period, it is very clear that no right of set-off would arise in his favor, as such a right in that state of case would be wholly incompatible with the provisions of the charter in reference to the liquidation of the affairs of the corporation.

The language of the act, under which the commissioners are acting in winding up the affairs of the bank, is not materially different from that contained in the act of 1839 regulating the administration and settlement of estates, and under that act the right of set-off, where the debtor held a debt or demand against the testator or intestate at his death, has never been questioned; but such a debt is allowed to attach, and to operate as an extinguishment of that amount of the debt due the testator or intestate, on the principle that the balance which remains after the set-off is deducted, is all that is actually due to the estate, and which can be rightfully and justly applied in the course of administration. (*Ely*, §c. vs. *Horine*, 5 *Dana*, 398.)

We think that the same doctrine should be applied in this case. The defendant did not actually owe the bank anything at the time its corporate existence

terminated. His demand against it had previously accrued, and there was nothing due from him to it, to be regarded as assets or effects belonging to it, to be administered by the commissioners.

Wherefore the judgment is affirmed.

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vs.
POLLYS, &c.

Merrit vs. Pollys, &c.

Case 8.

APPEAL FROM CLARKE CIRCUIT.

ORD. PET.

1. After a partnership has been dissolved, and notice thereof, one partner cannot bind his former co partner by any other instrument of writing which creates a new cause of action, even for the renewal of a partnership note, or the liquidation of a partnership account.
2. But a note given by one of a firm, in the usual course of business, will be binding on the other members of the firm, unless the payee had notice of the dissolution.
3. The court should not give to the jury a positive instruction to find a particular fact when there is testimony conducing to show the contrary.
4. One of a late firm who has executed a note for a debt of the late firm, which was probably barred by the statute of limitation, is an incompetent witness to charge another member of the firm in a suit upon the note.

The facts of the case are stated in the opinion of the Court. *Rep.*

C. Allen for appellant.

D. Breck for appellee.

Judge Simson delivered the opinion of the Court.

December 12.

The question which arises in this case is, whether or not, after a dissolution, a note made by one partner, in the name of the firm, in liquidation of a firm debt, will bind his co-partner.

The doctrine is well settled, that after a partnership has been dissolved, and legal notice of the dissolution has been given, one partner cannot bind his

1. After a partnership has been dissolved, and notice there

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of, one partner cannot bind his former co-partner by any other instrument of writing which creates a new cause of action, even for the renewal of a partnership note, or the liquidation of a partnership account.

2. But a note given by one of a firm in the usual course of business, will be binding on the other members of the firm unless the payee had notice of the dissolution.

3. The court should not give to the jury a positive instruction to find a particular fact when there is testimony conducing to show the contrary.

co-partners by the execution of a note, or any other instrument of writing which creates a new cause of action, even for the renewal of a partnership note, or the settlement or liquidation of a partnership account. (*Abet vs. Sutton*, 3 *Esp.*, 108; *Wrightson vs. Pullam*, 1 *Starkie*, 375; *Sandford vs. Nickles*, 4 *Johns. Reports*, 224; *Bank of South Carolina vs. Humphreys*, 1 *McCord*, 388; *Bell vs. Morrison*, 1 *Peters' South Carolina Reports*, 351; *National Bank vs. Norton*, 1 *Hill's New York Reports*, 572.)

According to strict legal principles one partner has no power, after the dissolution, to bind his co-partner; but for the protection of third persons the obligation of the firm and the authority of the partners are continued until legal notice of the dissolution is given. But partners should be held liable in such cases only where the holder has received the note in the usual course of business, and without any knowledge that a dissolution had taken place. (*Bristol vs. Sprague*, 8 *Wendell's Reports*, 424; *Whitman vs. Leonard*, 3 *Pick.*, 179)

In this case the note upon which the action was brought was executed by one of the partners upwards of two years after the dissolution had occurred; it was given for goods which had been purchased of the plaintiffs for the firm previous to the dissolution, and was signed "Brown & Merritt, in liquidation"—Brown & Merritt having constituted the firm.

The dissolution, the time thereof, the subsequent execution of the note, and its consideration, having been proved, the defendant moved the court to instruct the jury that on the testimony adduced they should find a verdict in his favor, but the court overruled the motion, and instructed the jury to find for the plaintiffs.

This instruction cannot be sustained, for if it be conceded, as we are inclined to think it should be, that the note sued on must be regarded as having been executed and received by the holders in the usual course of business—see *Vernon vs. Manhattan Co.*

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17 *Wendell*, 524—still there was not such an entire absence of testimony with respect to the knowledge of the plaintiffs at the time it was executed, that the firm had been previously dissolved, as to have justified an imperative instruction that the jury should find a verdict in their favor. It is true there was no proof that notice of the dissolution had been published, or that the fact had been directly communicated to the plaintiffs, but the time which had elapsed after the dissolution before the note was executed, and the peculiar manner in which the signature of the name of the firm was made to the note, indicating that its affairs were in a state of liquidation and final settlement, were circumstances from which the jury might have inferred a knowledge, by the plaintiffs at the time of its execution, that the firm had been previously dissolved. The question of notice should therefore have been referred to the jury, and the instruction as given was erroneous.

The deposition of the partner who executed the note in the name of the firm was read in evidence, and it is contended that he was an incompetent witness, and consequently that his testimony was improperly admitted. As however the deposition was read upon the trial without objection, no question can now be raised with respect to the propriety of its use upon that trial, but as it may, and probably will be objected to on the next trial, it is proper that we should, at this time, consider the question of the competency of this witness.

By the execution of the note in the name of the firm, he has bound himself for its payment, whether it be obligatory on the other partner or not. If, at the time of its execution, the debt was barred by the statute of limitations, as the facts proved by him tend to show, then, if he were to pay the note, the defendant not being legally liable for the debt for which it was executed, would not be liable to him for contribution. In that state of case, therefore, the witness has an evident interest in having the defend-

4. One of a late firm who has executed a note for a debt of the late firm, which was probably barred by the statute of limitation, is an incompetent witness to charge another member of the firm in a suit upon the note.

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ant made liable upon the note, and cannot be regarded competent.

Wherefore the judgment is reversed, and cause remanded for a new trial and further proceedings consistent with this opinion.

Case 9.

Henderson and Nashville Railroad vs. Leavell.

ORD. PET.

APPEAL FROM CHRISTIAN CIRCUIT.

1. When the terms of a subscription are prescribed by a charter, it is not necessary to state the terms in the petition; and a general averment that all the terms and conditions necessary to authorize a demand of payment of subscriptions is sufficient under the 149th section of the Code of Practice.
2. To authorize a corporation, created by statute, to sue, it is not necessary that it should aver its regular organization, and generally one dealing with a corporation is not permitted to deny its existence.
3. It is not necessary to aver readiness to perform a part of a contract which is to be performed after the act complained of.
4. Conditional subscriptions to a railroad, not inconsistent with the terms of a charter, are binding if the conditions are performed.

The facts of the case appear in the opinion of the Court. *Rep.*

N. E. Gray, L. Lindsey, and B. & J. Monroe, for appellee—

The petition refers to a subscription, without any conditions; that exhibited contains conditions on its face. It is true it is averred that the directors have complied with all the conditions on which the defendant was to be liable; have made the calls, &c. Is the paper filed to be regarded as part of the petition? We suppose not, and refer the court to the case of *Hill for Wintersmith vs. Barret*, 14 B. Monroe, 86. In that case the court said that it was not sufficient to refer to a writing in the petition, and file it, but that so

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much of the contract contained in the writing is to be set out as will show the acts of omission or commission which entitles the plaintiff to relief. That has not been done in this case. No part of the writing is set out either literally or according to its legal import.

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It is no where stated what was the condition on which the subscription was to become absolute. A general averment of the performance of conditions precedent is not sufficient. The manner of performance should be stated. (6 *Monroe*, 322.)

If the paper which is in part copied into the record is to be regarded as the paper referred to in the petition, there was not only one but three distinct conditions, on which the liability of the appellee to pay the whole subscription depended—1. The road was to touch or pass near the corporate limits of Hopkinsville. 2. The money subscribed was to be expended in Christian county. 3. A deduction was to be made of the amount of any tax that might be voted upon the appellee by the county of Christian. The last condition may properly be a matter of defense. The second may be a subsequent condition; but it is insisted that performance of the first should have been averred. Whether it has been legally performed must be decided by the court upon an averment of the location of the road, and its distance from Hopkinsville. The expression *near* to Hopkinsville is very indefinite. One man would say one, another five, and a third ten miles. The averment on this subject should have been specific, after setting out the terms of the contract. (See *Wright vs. Shelbyville Railroad Company*, MSS. opinion of July 16, 1855.) A party must plead facts, not conclusions, of law, that his adversary may confess and avoid traverse or deny.

The court is referred to the following authorities: 1 *Condensed Rep.*, 371; 2 *Cranch*, 127; 2 *Johnson's Reports*, 109; 6 *Monroe*, 428, 9.

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Robert McKee for appellant—

The Circuit Court erred in sustaining the demurrer to the petition.

The defendant subscribed for stock in the Henderson and Nashville Railroad, upon condition that the line of said road should be located through or near the town of Hopkinsville, and the sums subscribed should be expended in the county of Christian. The road was located through the town of Hopkinsville, and ten several calls were made upon the subscribers, of five dollars on each share, and the defendant having failed to meet the calls made upon him this suit was instituted to compel payment.

The defendant demurred to the petition, assigning four causes of demurrer. Of them, in their order—
1. The plaintiff does not aver that there is such a corporation legally existing. This is not necessary. Facts are averred from which the legal existence of the Henderson and Nashville Railroad Company is a necessary and legitimate deduction, and which presupposes its legal existence, all which is admitted by the demurrer. Of this class of averments is that of the election of a directory by the company or stockholders. That defendant being a stockholder voted at at such election, and that the directors, so elected have complied with all the stipulations and conditions upon which the liability of the defendant depended. (See *Charter, Session Acts of 1850-1, secs. 1, 2, 8, 10, 13, page 281 to 288.*) The averment that all the conditions have been complied with presupposes the election of the directory and the organization of the company, which constitutes its legal existence.

2. It is objected that there is no averment of readiness to expend the money in Christian county. The money cannot be expended until collected. Such averment was not necessary. The application of the money is a condition subsequent. The proper authorities might interpose after the money is paid,

to prevent any misapplication by the directors, who are but the trustees of the company.

3. The plaintiff claims the first installment, which should have been paid in advance. This is no cause of demurrer, if it is a valid answer to any part of the demand.

4. There is no averment whether the subscription was payable in money. Money is what the plaintiff has a right to demand, as nothing else is provided for or agreed to be paid.

The Circuit Court entertained the opinion that the commissioners had no power to take conditional subscriptions. This was for the benefit of the subscribers, and they cannot object, if the conditions have been complied with by the directory, and the objection is one of which the subscribers have no right to complain.

Judge SIMMONS delivered the opinion of the Court.

The plaintiffs' petition sets forth a good cause of action—it alleges that the defendant subscribed for and took fifteen shares of the capital stock of the Henderson and Nashville Railroad Company, each share being for one hundred dollars, which subscription was made in writing by the defendant, and that the writing will be filed as a part of the petition as soon as the same can be procured. It then contains allegations which show that ten calls, of five dollars each, had been made by the directors of said company, in conformity with the requirements of the charter, none of which had been paid by the defendant. The writing referred to was filed before the defendant filed his demurrer. The obligations which the subscription imposed on the defendant were created and prescribed by the charter, and being matters of law, it was unnecessary to state them in the petition. It was averred that the plaintiffs had complied with all the conditions on their part, which general averment was authorized by the 149th section of the Code of Practice. The rule laid down in the case of *Hill* for the use of

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1. When the terms of a subscription are prescribed by a charter it is not necessary to state the terms in the petition; and a general averment that all the terms and conditions necessary to authorize a demand of payment of subscriptions is sufficient under the 149th section of the Code of Practice.

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Wintersmith vs. Barrett, &c., (14 B. Monroe, 83.) and which has been relied upon in argument to prove that the petition in this case is defective, only requires the plaintiff to state in the petition so much of the contract as shows that he, by reason of the alleged acts or omissions on his part, and of those on the part of the defendant, is entitled to an action and to relief.

Testing the petition in this case by this rule, it appears that it contains, on its face, and without reference to the contents of the writing alleged to have been made by the defendant, a statement of facts which constitute a good cause of action, and is therefore sufficient. If the writing upon which the action is founded, contains precedent conditions which the plaintiff must perform, as a general allegation of performance by him is all that is necessary, there does not seem to be any good reason why he should be compelled to state in the petition that part of the written contract which embraces such conditions, but the defendant, if he relies upon the fact that they have not been complied with, can state them at large, and specify the particulars in which the plaintiff has failed to comply with them. But it is not necessary to decide this point at present, because the writing sued upon does not in our opinion contain any precedent condition, or any stipulation that renders the payment of the stock subscribed for by the defendant dependent on the performance of any prior act by the plaintiffs.

The writing does not contain any stipulation that the stock subscribed for is not to be paid until the road is located as therein mentioned, but only that when the road is located it shall touch or pass near a certain point, and that the amount subscribed shall be expended in said county. These stipulations form part of the contract, and their violation might operate to discharge the defendant from all obligation to pay the amount subscribed by him; and even after its payment he would have a right to restrain the

plaintiffs from appropriating it to any other purpose, and from using it in any other manner than that contemplated by the terms of the subscription.

But as these stipulations were made for the benefit of the subscribers, and do not create any conditions precedent which the plaintiffs had to perform, it was not necessary for them to set them forth in the petition, nor to make any averments in relation to them. They were made for the benefit of the subscribers, and they have a right to require a faithful compliance therewith, and may, if such be the case, make it appear that they have been broken and disregarded.

It is not necessary that the plaintiffs should show that the company has a legal existence, and a right to sue in its corporate capacity, by being organized in the mode prescribed by the charter. This is never required in a suit by a corporation; and in general where a defendant deals with a corporation, and recognizes its existence, he is not permitted to raise the question whether it has been legally organized or not. If the defendant, as alleged in the petition, participated as a stockholder in the election of the directory, his right to controvert the corporate existence of the company, may be very questionable.— But be this as it may, this question cannot be made on demurrer, as it was unnecessary to state in the petition such facts as would show that the requisitions of the charter had been complied with, and the company had been legally organized. The first objection to the petition, made in the demurrer, is therefore not valid.

The second ground of objection therein made to it is also untenable. The money subscribed could not be expended until it was paid; its expenditure was a subsequent act, which the plaintiffs had to perform, and consequently it was unnecessary for them to aver their readiness to comply with the terms of the subscription. An averment by the plaintiffs of an offer or readiness to perform on their part, is only necessary where the acts to be done are concurrent, and is

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2. To authorize a corporation created by statute to sue, it is not necessary that it should aver its regular organization, and generally one dealing with a corporation is not permitted to deny its existence.

3. It is not necessary to aver readiness to perform a part of a contract which is to be performed after the act complained of.

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not required where the defendant has to pay the money before the plaintiffs are bound to do anything.

The third ground of objection is equally unavailing. The petition does not show that the first installment due on each share is sued for, but only that ten installments, which have been called for, and which remain unpaid, are demanded in the action. Whether the installments thus demanded are the first, or the last, on the stock subscribed, does not appear; and certainly if, as it is assumed by this objection, the plaintiffs had a right to sue for the first installment, because it should have been paid at the time the stock was subscribed, it should not therefore be presumed that one of the installments mentioned in the petition was the one that was due, and should have been paid without being called for. For this reason this objection was invalid; but the objection, even if the first installment had been sued for, would not have applied to the other installments, and the fact that it should have been previously paid by the defendant would hardly seem to furnish a good reason why he should not be compelled to pay it in this action, if he had not previously paid it.

The stock of course was payable in money, as there was no stipulation that it should be paid in anything else, and consequently no averment on this subject was required.

4. Conditional subscriptions to a railroad not inconsistent with the terms of a charter, are binding if the conditions are performed.

The stock in this case is not conditional, although the defendant has in the act of subscribing for it brought the company under certain obligations to him in relation to it, with which they are bound to comply. Such stipulations are not incompatible with sound policy, or with any of the provisions of the charter. They do not render the subscription void, but operate, as it was intended they should, for the benefit of the stockholder. But even if the subscription had been made upon the express condition that the money should not be paid until certain acts were done by the company, when those acts were done the stock would then be unconditional, and the sub-

scribers would be compelled to pay it, as was decided by this court in the case of the *Maysville and Lexington R. R. Co. vs. McMillan*, 15 B. Mon. 218.

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The court below therefore erred in sustaining the demurrer to the petition.

Wherefore the judgment is reversed, and cause remanded that the demurrer to the petition may be overruled, and for further proceedings consistent with this opinion.

Isaac and others, (of color,) vs. Graves' Executor. Case 10.

APPEAL FROM WOODFORD CIRCUIT.

ORD. PET.

1. The will contained this clause: "Each and every one of my slaves are to be liberated and placed in the hands of the Kentucky State Colonization Society, for the purpose of being colonized to Liberia;" Held, that in the foregoing clause there are no words of immediate emancipation, but the slaves are to be placed in the hands of the society for the purpose of being colonized to (in) Liberia. The liberation and indicated disposition is for the single purpose of being colonized, and so connected with it as to be incapable of a separate and independent operation, without violating the intention of the testator. Their colonization as far as it depends upon the slaves is a condition precedent to their emancipation.
2. A bequest to slaves, each of an equal share in one-half the proceeds of the testator's estate, being illegal, can only be made effectual on their becoming free, and capable of taking as legatees; and none are entitled to freedom or to the bequest made to them who are not colonized.
3. The will, making no provision for the expense of transportation of the slaves to Liberia, or requiring that it shall be at the expense of the Colonization Society, if there be no other fund, a portion of the legacy is to be appropriated to that purpose, in consistency with the will and the *Revised Statutes*, page 644.
4. The right to freedom on the part of the slaves being prospective, their hire, until their freedom is complete, is a part of the estate, and properly a fund for distribution, as the balance of the estate, and may properly be applied to defray the expenses of transportation, equally for the benefit of all; and the remaining parts paid to each adult on arriving in Liberia, or on their embarkation, and the parts of the infants so secured to them in Liberia that they receive it on arriving at full age.

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The facts of the case are stated in the opinion of the court.—*Rcp.*

Morehead & Brown and Rodman for the appellants.

B. Monroe and J. Harlan for the society.

T. N. Lindsey for the executor.

December 15.

Chief Justice MARSHALL delivered the opinion of the Court.

This petition was filed by Thomas Jett, executor of Nelson Graves, deceased, to obtain a construction of the will of his testator, and a determination of the rights growing out of it as they might effect his own action in the management of the estate, and in fulfillment of the trust confided to him. The will, which was admitted to record in August, 1853, first directs Thomas Jett, whom it appoints executor, to sell all the real and personal estate of the testator except the slaves, as soon as possible, on a credit of one and two years, and at public or private sale as he may deem proper. The second clause gives \$1,000 to the Kentucky State Colonization Society. The third gives \$500 to the executor. The fourth directs that when the above property is sold, and the proceeds collected, the executor shall pay one half of it to certain relatives of the testator. The fifth says: "The other half is to be paid over to my slaves, each and every one of them to have an equal share." The sixth clause is as follows: "Each and every one of my slaves are to be liberated and placed in the hands of the Kentucky State Colonization Society for the purpose of being colonized to Liberia." The seventh merely appoints the executor to carry the will into effect.

The petition makes defendants the testator's relatives who are legatees, and also the slaves therein referred to, and also the Kentucky State Colonization Society, and all seem to have been actually or constructively summoned. Many of the slaves appear to be infants, for whom the usual answer was filed by their guardian *ad litem*. The adult slaves gener-

ally claim in their answers, that by the will their freedom is immediate and absolute, and their right to equal shares in one half of the proceeds of the estate as soon as realized, dependent upon no condition; that they are not bound to go to Liberia, but under the laws of the state are bound only to remove from it, to become entitled to the full enjoyment of their freedom and of the legacies bequeathed to them, and that they are severally entitled to the proceeds of their respective labor or hires since the testator's death; and they object to the appropriation of any part of these hires to the benefit of any but those who have respectively earned them, or to the expense of transporting them to Liberia.

It is upon these and some other points that the executor states his difficulties, and asks the decision of the court; and by the decree rendered the most important of the questions are decided. Without stating in detail the several principles or directions of the decree, we proceed on our own conclusions with respect to the matters decided, the case having been continued in the circuit court as to the matters not specifically decided.

1. Upon the emancipating clause in the will, we are of opinion that as there are no words of immediate emancipation, but the language is that the slaves are to be liberated and placed in the hands of the Kentucky State Colonization Society for the purpose of being colonized to (in) Liberia, the liberation and indicated disposition of the slaves being avowedly for the same and single purpose of their being colonized in Liberia, are alike subordinate to the purpose. There is but one intention in the entire will, and that is that the slaves shall be liberated and handed over for the purpose expressed. If the avowed purpose for which alone they are intended to be liberated cannot be, or is not accomplished, there is no evidence of an intention to liberate. It is true the words, each and every one of my slaves are to be liberated, would, if standing alone and unqualified,

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1. The will contained this clause: "Each and every one of my slaves are to be liberated and placed in the hands of the Kentucky State Colonization Society, for the purpose of being colonized to Liberia: Held that in the foregoing clause there are no words of immediate emancipation, but the slaves are to be placed in the hands of the society for the purpose of being colonized to (in) Liberia. The

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liberation and indicated disposition is for the single purpose of being colonized, and so connected with it as to be incapable of a separate and independent operation without violating the intention of the testator. Their colonization, as far as it depends upon the slaves, is a condition precedent to their emancipation.

be deemed sufficient to indicate and effect an immediate emancipation, but they would be so deemed for the very reason that there would be nothing to postpone, or in any manner to qualify the clearly expressed intention that the slaves should have their freedom, and therefore they would, as in other cases, be entitled to the immediate benefit of the gifts as soon as by the testator's death the will should become effectual. In this case the intended emancipation of the slaves is prospective, and so connected with the purpose of their being colonized, as to be incapable of a separate and independent operation without violating the manifest intention of the testator. The colonization, as far as it depends upon any act of the slave, is a condition precedent to the emancipation, and as the law withholds the full enjoyment of freedom from an emancipated slave until his removal from the state, the will makes the removal for the purpose of being colonized the condition of freedom, and appoints the delivery to the society as the means of effecting that purpose.

2. A bequest to slaves, each of an equal share in one half the proceeds of the testator's estate, being illegal, can only be made effectual on their becoming free, and capable of taking as legatees, and none are entitled to freedom or to the bequest made to them who are not colonized.

2. The bequest of money to the slaves, as slaves, being illegal and void, it must, as the only means of making it effectual, be construed as a gift in future, to take effect when the slaves become free and capable of being legatees, and as being therefore wholly dependent upon their becoming so. Since then this bequest must have the same effect as if it read, "The other half (of the proceeds of sale) is to be paid over to my slaves when they become free according to this will, each and every one of them to have an equal share," and as there is no other gift but in this direction to pay, it follows that the right to the legacy depends upon the same condition as the right to freedom, that none are entitled to the legacy who refuse or fail to do their part in the performance of the condition by conclusively submitting themselves to be transported to Liberia for the purpose of being there colonized, and that it is only to those who thus secure their freedom as designed by the will,

that the legacy is to be paid to each an equal share. As the legacy did not vest in any of the slaves upon the death of the testator, and cannot vest in any until the condition, as far as it depends upon them, is performed, the effect of the previous death of any, or of the conclusive failure or refusal of any to perform the condition, is to diminish the number of those among whom the legacy is to be distributed. The willingness of any of the slaves to remove from this state to any other country or place than Liberia, or the actual emigration of any of them from Kentucky to any other state or place, is no compliance with the requisition or purpose of the will, and does not give freedom under its provisions.

3. The will does not expressly create or appropriate a fund for the removal of the slaves to Liberia, but it certainly intends that they shall be taken there, and as the testator does not make their removal by the Colonization Society a condition of the legacy to it, nor otherwise attempt to charge it with this burthen, which it cannot be compelled to perform or undertake gratuitously, we are of opinion that if there be no other means properly applicable to this object, and as far as other means may be deficient, the legacies given to the persons themselves, who for their own supposed benefit are required to go or to be taken to Liberia, may and should, under the direction of the chancellor, be appropriated to that purpose. But there is another fund, viz., that arising and which may have arisen from the hires of the slaves before their departure for Liberia, which is primarily liable to be appropriated for bearing the expense of their removal. If these slaves had been immediately emancipated by will, and their removal to Liberia had been directed without any provision for the necessary expense, they would, under the provisions of the Revised Statutes on the subject, (*R. S. page, 644, &c.*) have been hired out under the direction of the county court, to raise a fund for defraying the expense of removal, and for their maintenance

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3. The will, making no provision for the expense of transportation of the slaves to Liberia, or requiring that it shall be at the expense of the colonization society, if there be no other fund, a portion of the legacy is to be appropriated to that purpose, in consistency with the will and the *Rev. Stat., page 644.*

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for twelve months afterwards, the proceeds of the labor of each family being united in a common fund for its benefit. As the slaves in this case were not immediately emancipated by the will, they were not directly subject to this provision, but came under the authority of the executor for the purposes of the will, one of which, and a very important one, was that they should be removed to Liberia. It was his duty to hire or to employ them prudently, and with a view to their comfort. And as there is no intimation in the will, nor any presumption from its general tenor, or from the circumstances of the estate, which was large and unembarrassed, that their earnings should be appropriated otherwise than for their own benefit, we think it is entirely consistent with the will, and may without violence be inferred from it, that they should constitute a fund for defraying the expense of removal, which the example of the statute indicates as their proper object.

4. The right to freedom on the part of the slaves being prospective, their hire, until their freedom is complete, is a part of the estate, and properly a fund for distribution, as the balance of the estate, and may properly be applied to defray the expenses of transportation equally for the benefit of all; and the remaining parts paid to each adult on arriving in Liberia, or on their embarkation, & the parts of the infants so secured to them in Liberia that they receive it on arriving at full age.

But the question arises how far these earnings from the labor of different individuals shall constitute a common fund to be appropriated to the general expense of removal. If each of these individuals was free, each would be entitled to his own earnings without the participation of others, except so far as the obligations of kindred and family might require. But they are not actually free. They have only the prospective right to freedom upon a prescribed condition, until the happening of which they are not the masters of their own labor, nor the proprietors of its earnings. These go to the executor for the purposes of the will, and he takes them not as the property of the several slaves, but rather as property of the estate which may, and by implication should be appropriated towards the discharge of the burthen of removal, which so far as it is thus borne is borne by a fund in which none of these individuals has a specific right or interest distinct from that of others. The will evidently intends that all the slaves shall be colonized in Liberia, and it contemplates, though it may

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not require that they shall all go at once or in a body. We think it also intends that they shall participate equally in every benefit which it confers, and especially that each shall have an equal capital to be used for sustenance or profit in that distant and strange region to which they are to be consigned.— But this equality, intended to take effect at the moment of liberation, would be frustrated and broken up, if the previous earnings of each were to be appropriated to his or her separate use in defraying the expense of preparation or transportation, and if the share of each in the legacy were to be charged with so much as his or her earnings should fall short of paying this expense. If this were so, it would necessarily occur, and as we think contrary to the probable intention of the testator, that those who from infancy or age, or the incumbrance of children, were the least capable of profitable labor, and the most in want of assistance, would find their shares in the legacy more or less reduced by a charge which, as the testator must have expected it to be defrayed in some form, it may be presumed that he did not expect or intend it to be defrayed or charged in such form as would necessarily and at the very moment of distribution, and of need, defeat the prescribed equality, and by reducing the shares of those who would be most in need, place them, in comparison with their fellows, under increased disadvantages. Under these considerations, we are of opinion that the intermediate hires accruing before the departure for embarkation, should be a common fund to be appropriated to the general object of preparation and removal. And we are inclined to the opinion that so far as the legacies are to be charged with any portion of the expense of removal, the charge incurred up to the time of embarkation, and including the ordinary passage money, should be deducted from the aggregate fund to be divided; and that by this or some other mode of proceeding, there should be the substance as well as the form of equality in the distribu-

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tion. There may indeed be some question whether, if the hires be insufficient to defray the entire expense of removal, the deficiency should not be supplied from the estate of the testator undisposed of by the will, if there be any such, rather than from the specific legacies to the individuals who are to be removed. But there being no complaint or suggestion on this subject, and as there may be no decisive reason against the latter alternative, which was adopted in the decree of the circuit court, we concur in that mode of making up the deficiency should there be any, but with the qualification that the ordinary expenses of preparation and transportation, as ascertained at the time of embarkation for Liberia, shall constitute an aggregate charge upon the fund to be distributed, and that the equal share of each in the residue shall be subject to any special or extraordinary charges incurred by or on behalf of the several individuals, or any of them.

4. It would seem to be proper that the executor should ascertain at what time the Colonization Society will be ready to receive the negroes for immediate removal, and should also ascertain and furnish the means of procuring the articles necessary for the removal and the voyage; and the proper use of such articles should be actually secured to the emigrants by delivery to the proper persons at the proper places—for all which the executor, or some other person to be appointed by the court, should provide. So far as the Colonization Society shall take charge of any of the negroes for the purpose of removing them to Liberia, the proper agent or agents of the society will be thereupon entitled to receive from the executor the sum necessary for defraying the cost and expense to be incurred in performing its undertaking. And the society, or its agent, undertaking to transport and colonize the negroes, may properly be selected by the court as the agent or commissioner to be entrusted, under proper security by bond or otherwise, with the duty of receiving on this side of the

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Atlantic, and after making proper deductions for necessary disbursements, paying over the legacies to parties entitled, on their arrival at their destination in Africa. The proper application of all money passing from the executor into other hands, for any of the purposes above mentioned, should of course be secured in the usual manner. And we do not know that there is anything inappropriate in the details of the decree on this part of the subject, except as the mode of making up the account of each of the negroes, for the purpose of ascertaining the balance due to each, may vary from the mode indicated in this opinion. But the decree is not specific in directing when and where the payment of the balance is to be made. We think the payments should be made at any rate after embarkation, and we should think it more provident to make them even to the adults after arrival in Liberia, and that the shares of the infants should be paid there to such person or persons as, by the laws of the place, are entitled to receive and would be responsible for them. As it is of the utmost importance to the intended colonists that the funds intended for their use in their new homes, should be scrupulously guarded and secured for their use, we think it would have been provident to require the executor, or a commissioner, to ascertain what arrangements or provisions, made either by the Colonization Society or by the laws of Liberia, may be made available for this security in the present case. The requisitions of the decree are apparently proper, and may correspond with the arrangements or provisions referred to; and there being no particular complaint in this respect, the presumption is that it does, and at any rate there is enough of the case retained to authorize any modification of these details which further information, to be required either from the executor, or from the agent of the Colonization Society, who is in effect made the agent of the court, may show to be necessary or useful.

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Upon the whole, there being an almost entire conformity between the principles of this opinion and the decree appealed from, and the difference not being such as to establish in the appellants any right contested between the parties, and the case being designed for the benefit of the executor and the estate, by the speedy settlement of questions growing out of the will, the executor must pay, out of assets, the costs in this court; and without a formal affirmance or reversal, the cause, with this opinion, is remanded to the circuit court, which may take any proceedings which may be necessary to secure the rights of the appellants, as declared by this opinion.

16m 376
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16bm 376
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Case 11.

Lillard vs. Turner, &c.

PET. EQ.

APPEAL FROM ANDERSON CIRCUIT.

1. The separate property of a married woman is liable for debts which she may contract upon the faith of that property, and the husband cannot interpose any obstacle to the collection of those debts, especially after permitting the wife to trade with others, and deal with the property as if she was unmarried.
2. Courts of equity will subject the separate property of a *feme covert* to the debts which she may create; and the execution of notes is sufficient evidence of her intention to charge her separate estate with the payment of the debts for which she executes her notes. (7 *B. Monroe*, 293; 13 *Id.*, 384.)
3. A separate estate in a married woman confers upon her the power to deal with it as a *feme sole*. The right which she acquires in property under the operation of the statute to protect the rights of married women, confers no such power. (12 *B. Mon.*, 329.) The two estates are different. The one can be rendered liable for debts by the separate act of the wife; the other only in the way designated by the statute.

The facts of the case are fully stated in the opinion of the court.—*Rep.*

Kavanaugh & Penny for appellant—no brief on file.

John Draffin for appellee.

Judge SIMPSON delivered the opinion of the Court.

The fact that the note for \$136 69, which was executed by Esther Turner to Phirl and Jennings, bears the same date of the mortgage which was executed by her and husband to the same parties, would seem to leave no room for doubt that its payment was to be secured by the mortgage. It is not reasonable to suppose that this debt, which then existed, and a note for which was given at the same time the mortgage was executed, was not intended to be embraced by it. The mortgage is unskillfully drawn, and fails to state the real object of the parties, but it secures the payment of a sum more than sufficient to cover this note and the debt to Dedman, and we entertain no doubt that it was to be secured by it. But the mortgage does not purport to have been made for the purpose of securing the payment of any debt which might be subsequently created, and its operation cannot therefore be extended so as to embrace debts of that description.

We do not however consider the legal effect of the mortgage of much consequence in these cases. The deed of trust executed in 1842, by Mizener to Walker, vested Esther Turner with a *separate estate* in the property therein conveyed. The deed was entered of record, and Esther Turner has dealt with the property, and created debts upon the credit of it, as if she had been an unmarried woman. So far as existing creditors are concerned her husband is not in an attitude to impeach that deed. Instead of adopting the proper course to have it vacated and set aside, if he had a right to do so, he has not only permitted it to remain on the record unimpeached, but he has also permitted his wife to trade for herself, and to deal with the property as if she were unmarried. He cannot, under these circumstances, be permitted, in opposition to the claims of her creditors, to assert an equity to the property, and to con-

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1. The separate property of a married woman is liable for debts which she may contract up on the faith of that property, and the husband cannot interpose any obstacle to the collection of those debts, especially after permitting the wife to trade with others, and deal with the property as if she were unmarried.

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2. Courts of equity will subject the separate property of a *feme covert* to the debts which she may create, and the execution of notes is sufficient evidence of her intention to charge her separate estate with payment of the debts for which she executes her notes. (7 B. Mon., 293; 13 B., 384.)

3. A separate estate in a married woman confers upon her the power to deal with it as a *feme sole*. The right which she acquires in property under the operation of the statute to protect the rights of married women confers no such power. (12 B. Mon., 329.) The two estates are different. The one can be rendered liable for debts by the separate act of of the wife; the other only in the way designated by the statute.

trovert her right to charge it with the payment of her debts, which have been contracted on the faith of its liability.

The deed creates a separate estate in the wife.—She had a right to incur liabilities, and to charge her separate estate with them, as if she had been an unmarried woman, and a court of equity will enforce the charge, and subject the estate to the payment of her debts. The execution of notes by her is deemed a sufficient indication of an intention, on her part, to charge her separate estate for the payment of the debts for which the notes was executed. (*Jarman vs. Wilkerson*, 7 B. Monroe, 293; *Bell & Terry vs. Kellar*, 13 B. Monroe, 384.)

A separate estate in a married woman confers on her a power to deal with it as a *feme sole*. The right she acquires to property, under the operation of the statute to protect the rights of married women, confers on her no such power. (*Johnson and wife vs. Jones*, 12 B. Monroe, 329.) The two estates are entirely different. One of them can be rendered liable for the payment of debts by the separate act of the wife, the other only in the mode pointed out by the statute.

The judgment of the court below is erroneous in all the cases. It is evident, from the testimony, that there is a considerable sum due, after allowing all the credits to which Esther Turner is entitled. The amount due should have been ascertained by a commissioner, and the separate estate subjected to its payment. The payment of the debts for which the small judgments were recovered, that were enjoined by Turner and wife, was positively denied, and if the debts were paid, as alleged, it was a good legal defense, and should have been relied upon in the trial at law. Payment in full is a legal and not an equitable defense.

Wherefore the judgments are reversed, and cause remanded for further proceedings consistent with this opinion.

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Foster vs. Watson, &c.

Case 12.

APPEAL FROM FRANKLIN CIRCUIT.

PET. EQ.

1. Where one undertakes to perform a contract of a specific character in services, upon which he is to receive a fixed compensation, he cannot claim such fixed compensation under the contract until performance, unless prevented by the other party to the contract, without cause, in which event the party is entitled to a ratable compensation, according to the terms of the contract; but if the other party have just cause for obstructing performance of the condition precedent, nothing can be claimed for the part performance but a reasonable compensation commensurate with the service rendered.
2. Though a party may have failed to fulfill a contract by the performance of service which would entitle him to a fixed compensation, if he has performed service for the benefit of the other party he may be entitled to compensation for the value of such services.
3. If a party in his bill in chancery fail to show that he is entitled to the specific relief which he asks, yet if he show a right to any relief, even in a court of law, a demurrer to the bill should not be sustained as to the whole claim, but the case transferred to the common law docket.

Thomas S. Page purchased of Gray & Todd a confectionery store in Frankfort, at a cost of about \$——, and engaged Lewis Foster to take charge of it, agreeing that when, by the profits arising from the business, it should be paid for, or Page otherwise released from responsibility, to convey the establishment to Mrs. James R. Watson and Foster, or to any one else they might direct. Foster having been before occasionally intemperate gave Page a verbal promise to keep sober, and attend faithfully to the business, which he did for about five months, when he took a drinking frolic. When about recovering from it he was presented with a paper by some one on behalf of Page, which he signed, acknowledging, in substance, that he had broken his promise to Page, and promising, if admitted again into the store under the contract, to keep sober, or on failing to do so to leave it and forfeit all interest therein. At the

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end of about two and a half months he again took a drinking frolic, when he was ejected from the establishment. Foster brought this bill for compensation for his services according to the contract, and for such other relief as might be just. The bill was demurred to, and the demurrer sustained, and Foster has appealed to this court.

J. Monroe for appellant—

Argued—1. That the court below erred in sustaining the demurrer to the bill. Foster entered upon the performance of the contract and labored faithfully for five months; during all that time he had, by his contract, an interest in the profits which were made.

2. That at the time Foster was ousted from the concern the credits and debts due the concern were more than sufficient to pay the original cost which had not been actually paid, when added to the individual account of the other partner; and he had then an equitable right to a transfer of the store, and the chancellor should require the adjustment to be made as if the transfer had been made.

3. The chancellor will not enforce a forfeiture, but will relieve against it. The paper C provides for the infliction of a penalty, which the chancellor will not carry into effect. That paper provides for the forfeiture of a vested right, as well as a right to be vested. A court of equity will never enforce a penalty, or allow a forfeiture, when compensation can be made in damages. (*Story's Equity*, sections 1313, 1314, 1315, 1316, 1320; *Newland on Contracts*, 307, 317; 1 *Atkins*, 449; 12 *Vesey*, 284; *Fonb. Equity*, B. 1, chap. C, sec. 4, note H; 1 *Vernon*, 449; 1 *Chancery Cases*, 190; *Brown's Chancery Reports*, 343; 2 *Pothier*, note pages 341 to 345; *Hardy vs. Martin*, 1 *Brown's Chancery Cases*, 419; *Ib.*, 190; 1 *Vesey*, 279; 17 *Ib.*, 126; *Pothier on Obligation*, note 345.)

Where a penalty is inserted merely to secure the performance of some collateral object this object is

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considered the principal intent of the deed, and the penalty only accessional, and to secure the damages really incurred. (1 *Muddox Chancery*, 32; 1 *Cox*, 126; *Keating vs. Sparrow*, 1 *Ball & Beatty*, 374.) If to secure the party against the real loss that might accrue was the intent of the paper C, then it was in the nature of a penalty to secure a forfeiture, and a court of equity will not suffer it to be effectual for such unconscientious purpose. (2 *Story's Equity*, secs. 331, 750, 775; *Kercheval vs. Swope*, 6 *Monroe*, 366; 1 *Peters*, 376; *Hardin*, 602; *Eastland vs. Vandersdale*, 3 *Bibb*, 374; *Butt vs. Bondurant*, 7 *Mon.*, 423; 1 *Call*, 353.)

There is no distinction between a penalty and a forfeiture, especially when the forfeiture can be compensated in damages, or arises upon the breach of a condition precedent. (2 *Story's Equity*, sections 1322, 1323, and note 1, page 688; 2 *Johuson's Chancery Reports*, 535; 4 *Ib.*, 431; *Eden on Injunctions*, chapter 1, pages 21-26; 2 *Com. Dig.*, 2, 3, 5, 8, 9; 1 *Chancery Cases*, 90; 1 *Vernon*, 222.) Lord Chancellor Thurlow said, in the case of *Solomon vs. Walter*, that relief in equity may be granted where a penalty is named in the bond not merely to secure the payment of damages in fact, arising from a breach, but to secure the performance of an act. (See the whole case, *American Leading Cases*, 72d vol. *Law Lib.*, side page 786, which is a leading case; *Benson vs. Gibson*, 3 *Atk.*, 395; *Errington vs. Aynsley*, 2 *Bro. Ch. Ca.*, 341; *Easton vs. Lynn*, 3 *Vesey*, 393.)

The principle involved is analagous to the cases frequently arising in England of forfeiting leases for failing to perform a variety of acts done, or not done, in violation of stipulations in written leases. (See *Nash vs. Lord Derby*, 2 *Vern.*, 537; *Ib.*, 664.) And no principle is better settled than that the chancellor will restrain a party from enforcing a penalty or forfeiture, where he can be fairly compensated in damages. Thus, in *Mays vs. Alcock*, 5 *Munford*, a bond was conditioned for the payment of \$7,000 in two years,

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with a proviso that if interest was not paid regularly, the principal should be due at once. The proviso was held a penalty against which equity would relieve on payment of the interest. The principle is clear, that where the object of the party is fulfillment of the contract, not the infliction of a penalty, or the acquisition of a collateral advantage, that it cannot be enforced.

It is clear that the object of Page was to secure the services of Foster, and hence the procuring the paper C. Foster, if he is deprived of any compensation, is loser to the extent of all his services, and when according to the showing of the bill he had well nigh fulfilled his entire undertaking, and is turned off without any thing. What has Page parted with, and what has Foster received if he is thus turned off? Page, &c., will have received the services of Foster, by which he is profited near \$1,000, and Foster receives nothing; by his failing to keep at all times in such condition as he agreed to do, he is made to forfeit all his services. It cannot be that Page looked to such a result. It cannot be that the law will sanction such a result. The object was to secure the faithful care and attention of Foster.—Foster, through weakness and want of self-government, forfeited the letter of the bond, but no serious injury resulted. And the forfeiture should not be enforced, but compensation should be made to Foster commensurate with the value of his services; though he may not claim it by the terms of the contract, yet he is equitably entitled to it. And the judgment of the court should be reversed.

J. Hurlan for appellee—

The facts as presented by Foster, in his petition, did not entitle him to any relief at the hands of the chancellor.

1. He admits that when the original agreement was made, he promised Mr. Page he would keep sober and attend to his business. He admits he viola-

ted that pledge by taking a spree as he calls it, but which was doubtless a drunken frolic, which continued for several days, perhaps a week.

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2. In order to reinstate himself and be placed in *statu quo*, he executed the paper marked C, in which he stipulates "that should I hereafter get to drinking, or otherwise become inattentive to my duties, *as agent aforesaid*, then I am at once to surrender all connection with the establishment named in this contract, and will forfeit all and *every kind of interest* whatever in said establishment, and will also forfeit all claims to wages, &c., it being expressly understood that the conditions of my remaining any longer as agent as before stated, that I am not to drink any sort of intoxicating liquors, or do any thing else that may interfere with my duties as agent as aforesaid. And I do hereby pledge myself to use all due diligence in my power to promote the interest of said establishment for the purposes named in the contract, it being understood that by my *strictly* complying with this additional requisition, my interest is to be as stated in the foregoing contract."

Foster admits he violated this last agreement by getting drunk, and so continued for several days.

3. It was argued there was no consideration for the last agreement. Does it require any money consideration for an agent to promise his principal he will keep *sobber* and always be in a condition to attend to business? Foster admits he made such a promise in parol at the outset; and it may be inferred it was a strong inducement to Page to engage Foster as his agent.

4. Is a party entitled to relief who shows that by the terms of his agreement he is not entitled to any? He made his own bargain and he should abide it. There is no hardship in compelling him to do it. He was in the store about seven months and a half, and received about \$75 or \$100 for his services. The presumption is he has been paid to the extent of the value of his services.

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Here is the case of a young man, a printer by trade, who engages to perform certain services, and upon the faithful performance thereof, and the whole establishment paid for, and Page released from all responsibility, he is to be an equal owner thereof.— He admits he failed to perform his duties, and asks the chancellor to reform the contract and pay him *pro tanto*. Is there any equity, or *morality*, in such an application? The party voluntarily gets drunk and endangers the whole establishment by permitting it to be burnt or robbed, and is not entitled to the favorable consideration of the chancellor.

There is nothing in the agreement that would authorize Foster to receive any benefit except by a strict compliance. I refer the court to the case of *Jewell vs. Thompson*, 2 *Lit.*, 52, and the authorities therein referred to by the court. The performance of the condition precedent is necessary to enable the party to recover on a contract. The non-performance by the plaintiff in that case was not his fault, but in consequence of the act of the government in making peace with Great Britain. In the English case cited by the court, the sailor who had shipped at Jamaica for Liverpool, and was to receive thirty guineas on his arrival at the latter port, died on the passage, and the court decided his administrator could not recover on a *quantum meruit*, although the sailor had performed his services faithfully to the time he was attacked with the disease that caused his death. In the other case, the plaintiff was to receive £100 for one years' services, but died three quarters of a year afterwards, the court said no recovery could be had for three quarters' services. The principle of these cases is, that a contract is an entirety and cannot be split up.

In the case at bar, the failure of the plaintiff was his voluntary act. His love of liquor overpowered him, and he claims compensation for services outside of his contract; a contingency not provided for by the parties.

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Page would not have employed Foster if he had supposed he would get drunk and neglect his business, and he cannot call on the court to change the contract, and pay him in a manner not contemplated by the parties.

It seems to me it is a case destitute of merit, and the judgment of the circuit court should be affirmed.

Chief Justice MARSHALL delivered the opinion of the Court.

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It is manifest from the statements of the petition that the primary object of the entire transaction to which it refers, was, so far as Page and the Watsons were concerned, to benefit Mrs. Watson by securing for her use the net profits, or a certain portion of the profits, of a confectionery store, which was expected, under proper management, to yield a large profit. It was for the promotion of this object that Page incurred the responsibility of purchasing the store, and it was for the purpose of securing at once an indemnity against that responsibility, and the intended benefit to Mrs. Watson, that the services of Foster for conducting and managing the business were engaged, by the promise of a joint and equal interest with Mrs. Watson in the entire establishment, so soon as it should be paid for, or when Page should be otherwise released from responsibility. To earn this extraordinary compensation was of course the motive of Foster for undertaking the service required, and was with him the primary object of his engagement. But with the other parties the object was to secure an indemnity to Page, and the intended benefit to Mrs. Watson, by the proper management of the business in which she was to be interested. It was to effect this object that the services of Foster were sought for and engaged; and that as a means of securing the requisite attention, skill and fidelity on his part, this prospect of extraordinary compensation, which according to the statements of the petition might be easily and speedily realized, was held out to him by the covenant of Page, that when the es-

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establishment should be paid for, (as it was expected to be out of its own profits.) or when Page should be otherwise released from responsibility for it, he would convey it to Mrs. Watson and Foster, or as they should direct. It was in that event only that the establishment was to become the property of Foster and Mrs. Watson; until then it was to remain the property of Page, who expressly reserved the right of employing another agent for its management.

1. Where one undertakes to perform a contract of a specific character in services upon which he is to receive a fixed compensation, he cannot claim such fixed compensation under the contract until performance, unless prevented by the other party to the contract without cause; in which event the party is entitled to a rateable compensation, according to the terms of the contract. But if the other party have just cause for obstructing performance of the condition precedent, nothing can be claimed for the part performance, but a reasonable compensation commensurate with the service rendered.

It is evident that the expected services of Foster constituted the sole consideration of any benefit intended to be secured to him by the covenant, and if its language imports anything more, it is to that extent wholly gratuitous and unenforceable. If this be not the case, then although Page might have to pay for the store himself, without any aid from its profits, or although Foster should withhold his services entirely, or should render such slight service, and in such a negligent manner as was manifestly inconsistent with his duty and inadequate to the attainment of the object of the contract; and if in consequence of this, another agent should be necessarily employed, and by his services the store should be made to pay for itself, Foster might still claim the promised compensation, however little he might have contributed by his services to the end and objects of the arrangement.— And as this would most obviously violate the intention of the parties, the covenant must be understood as being based upon the consideration and condition of a faithful and continued discharge on the part of Foster of the duties implied, not only in his undertaking to manage this concern for the purposes which his employers had in view, but also in the extraordinary compensation promised, and which evinces the importance of the object in view, and also and especially the importance attached to his services as the chosen means of its accomplishment.

It was evidently the expectation of the parties that the store should pay for itself, and that in this way the price for which Page had become responsible

should either be paid to him, or paid to his vendors in discharge of his responsibility. To effect this object the services of Foster were engaged, and upon its being effected they were to be compensated by the promised transfer to himself and Mrs. Watson. If a payment by or for the benefit of these parties, which should release or remunerate Page, might entitle them to the transfer, though the means of payment were not derived from the store, such an event does not appear to have been contemplated, and as it has not happened, it may be regarded as wholly out of the case.

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Then the essence and substance of the transaction was, a contract on the one side to employ and permit, and on the other to render service as the manager and conductor of the store for the purpose of paying for it out of the profits or proceeds of the business, and of thus entitling Mrs. Watson and the agent by whose services this object was to be effected, to the joint proprietorship of the store. And as the services of Foster were the only consideration for the interest which he was to have, so the continuation of those services until the object should be accomplished, was the sole condition on which he was to become entitled to the promised compensation, or any part of it. The contract on his part was a continuing contract, to terminate only with the accomplishment of its object, and as its performance was the consideration and condition of the stipulated reward, and could not be complete until the object of his undertaking was accomplished, he could not until that event be entitled to anything under the contract, because he could not until then have performed the condition precedent on which his entire right would depend. The prevention of his performance by the act of the other party, without his default, would take the case out of this rule, so far only as to entitle him to a rateable compensation according to the terms of the contract. But without such excuse for nonperformance, he would be entitled to nothing under the

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2. Though a party may have failed to fulfill a contract by the performance of service which would entitle him to a fixed compensation, if he has performed service for the benefit of the other party, he may be entitled to compensation for the value of such services.

express contract, and could at most claim compensation only for the value of his services actually rendered.

The petition discloses the fact, that in about five months after the making of this contract, and at a time when its object had not been either literally or substantially accomplished, he was by his own voluntary act, viz., by becoming and remaining intoxicated, rendered unfit, and in fact unable to attend to the business of the store, and that his services therein were in fact discontinued or suspended for some days. This was not only inconsistent with the duties implied in his undertaking to manage the store, and a violation of that engagement, but it was a breach of the express promise made by him on the requisition of Page when the covenant was delivered to him. But it was not merely a violation of duty and of contract, by failing to perform the proper services in the store, and by the breach of his verbal promise to abstain from intoxication; it was in itself gross misconduct, which proved, or tended to prove, that he was not to be confided in for the proper management of the business which had been entrusted to him, and which, although it might have been overlooked if the other parties had chosen, justified them in excluding him from future service and from all interest under the contract, unless under new stipulations which they might deem sufficient to secure that faithful attention and prudent management which the original contract certainly, though not expressly, required. And as he did actually enter into new stipulations, by which he agreed that if he should afterwards get to drinking, or otherwise become inattentive to his duties as agent, &c., he would at once surrender his connection with the establishment and forfeit all interest in it, and all claim to wages, we are of opinion that by his subsequently becoming and remaining intoxicated, and unfit for some days to attend to the business, he again put it in the power of the other parties to displace him from his

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employment, and to divest him of any interest under the contract, and that he has no right to complain on account of their having done so. He has by his own conduct violated his original as well as his subsequent engagement and duty, and having by his own fault failed in his part of the contract, and given to the other party the right to prevent his future action under it, he has lost the right to claim anything by virtue of its provisions in his favor. So far, therefore, his claim, as presented in the petition, is without foundation in equity, and the demurrer was properly sustained to that extent.

But we are of opinion that he still has a right to a just compensation for his services actually rendered, and that the court, instead of dismissing the petition, should have directed or allowed such amendment as would have presented the plaintiff's claim for his services independently of the contract, and on the principles of a *quantum meruit*, and should have transferred the case to the common law side of the court. The agreement to surrender the claim to compensation, was in effect a forfeiture, or penalty, from which the petition shows a right to be relieved, on account of the pressure of circumstances under which it was made, and to this extent the plaintiff showed himself entitled to such relief as would prevent the agreed forfeiture from operating against his claim to a reasonable compensation.

Wherefore the judgment is reversed, and the cause remanded with directions to overrule the demurrer, except to the extent above indicated, and for further proceedings.

3. If a party in his bill in chancery fail to show that he is entitled to the specific relief which he asks, yet if he shows a right to any relief, even in a court of law, a demurrer to the bill should not be sustained as to the whole claim, but the case transferred to the common law docket.

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PET. EQ.

APPEAL FROM TRIGG CIRCUIT.

1. Though the hirer of a slave will not be responsible for the value of a slave which he has bound himself to return at the expiration of the term of hiring, when he is prevented from doing so by the act of God, the slave, or the owner, yet he is responsible when his inability to return the slave arises from his own illegal and wrongful act.
2. The liability of the surety and the principal is the same; when the principal is bound the surety is also bound; the wrongful act of the principal will not exonerate the surety.
3. Where the object of a suit in chancery is to restrain the fraudulent disposition of property to avoid the payment of a legal liability, which is inevitable, (as for inability to return a slave hired, arising from the act of the hirer,) the chancellor has jurisdiction to settle and adjust the whole controversy. And two persons having separate right to sue at law may unite in a petition in equity in such suit, for the benefit of one party.

The facts of the case are stated in the opinion of the court. *Rep.*

Tho. C. Dabney for appellants—

Argued: 1. That the circuit court erred in overruling the demurrer to the petition. 1. Because there is an improper joinder of plaintiffs. If Carney is responsible for failing to deliver the slave hired by Coates, it is upon the covenant which was executed to Payne alone, and to which Thompson and Walden were not parties; and the action should be in form *ex contractu*. 2. The 30th and 34th sections of the Code, requiring that the suit shall be in the name of the party in interest, is understood to apply to suits by ordinary petition, to cases where the party has a legal interest, and in suits by petition in equity to cases where the party has an equitable interest, and not to authorize the union of parties where the interests are legal or equitable, without discrimination. The jurisdictions of the courts are to be kept distinct. The Code is not understood to intend a blending of the legal and

equitable jurisdictions of courts, but that they be kept distinct as before. (See *Code*, sections 4, 5, 6, 7, page 3.)

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2. The second paragraph is for an injury to personal property, and arising *ex delicto*, and coming within the 6th class as specified. Coates might have been responsible to Mrs. Walden as bailee, or sub-bailee, of her negro. Carney does not occupy that attitude; he never had the possession of the slave, nor the right to the possession. There is no privity between Mrs. Walden and Carney. Carney is in no way responsible but upon the written contract, which was not executed to Mrs. Walden.

3. The judgment is erroneous and not authorized by the allegations and proof in the case. The case of *Adams vs. Gardner*, 13 B. Monroe, 197, is relied on. That case is not like this. In that Gardner sued the Adams' as sub-bailees of the slave Kitty, to recover her value, she having died as was alledged for want of medical attention. Upon the facts and the well settled laws of bailment, the defendants were held responsible, they having acquired the possession of the slave from the intermediate, for a limited time only, upon hire, with a full knowledge of Gardner's ownership and reversionary interest in the slave, and bound, without any express contract, to use ordinary care, and restore the property at the expiration of the period of hire. These principles would apply, under an ordinary state of pleading and proof, to the defendant Coates, but cannot apply to Carney, who was not the bailee. Carney is alone responsible on his covenant as surety, and in no other way. The law implies no obligation beyond a written contract when one exists on the subject. The wrong was by Coates, not by Carney. The note and covenant was not to Mrs. Walden, and it was error to render any judgment in her behalf upon it against Carney, upon either cause of action set out in the petition.

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If Carney is responsible to any person on his covenant, it is to Payne, the obligee therein, and not to Mrs. Walden. It is from the instrument the intention of the parties is to be collected. (See *Wheaton's Selwyn*, 5th Am. from 9th Lond. ed., Tit. Cov., p. 447; *Young vs. Bruces*, 5 Litt., 323; *Singleton vs. Carrol*, 6 J. J. Marshall, 527.) The covenant was intended to secure the return of the slave to Payne on the 25th December, 1853. She was hired by Payne to Coates, and to secure the hire and the profit of ten dollars above the price he was to pay Mrs. Walden, it was not the intention of the parties to insure the life of the girl, nor against a criminal act affecting the life of the girl. Thompson or Walden are not parties to the covenant, and can derive no right of action from it. (*Singleton vs. Carroll, &c.*, 6 J. J. Marshall, 527.)

By hiring the slave to Payne & Thompson, Mrs. Walden reposed a special trust and confidence in them; they had no right to hire to Coates without her consent, and as bailees they rendered themselves responsible to her, and did not transfer their liability to Coates, or Carney, his surety.

L. Lindsay for appellant Pettit—

As the counsel for appellant Pettit, a few suggestions will be made:

1. There is a misjoinder of plaintiff. The right of action of Mrs. Walden is in *tort*. The right of action of Payne & Thompson is upon contract arising out of the covenant to pay hire and return the slave. These causes of action cannot be joined accruing to different parties. 2. They cannot be joined in a single paragraph in the petition. (See *Code of Practice*, Title 6, sec. 111.)

This case is not embraced by the provisions of the Code, Title 3, sec 34, which provides "that all persons having an interest in the subject of an action, and in the relief demanded, may be joined as plaintiffs, except where it is otherwise provided in the Code." There are two subjects of action in this

case. The one a wrong or injury to property in the rightful possession of the wrong doer. The other a violation of a covenant in regard to the same property. The proceeding is in conflict with *Title 6, sec. 111, of the Code*, which was designed to prevent confusion of parties.

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The subject of the action does not always authorize parties claiming an interest therein to unite. The hirer of a slave for one year may sub-hire to another for a shorter period, and stipulate for the return of the slave before the end of the year; for a breach of this last contract, the owner could not unite with the first hirer. The principle is the same in this case.

2. The right of action of Payne arises out of the contract to which Haney and Coates & Payne are the only parties. When sued for failing to return the slave, Haney, as the surety of Coates, may say that the slave is dead and cannot be returned, which is a valid defence. (See *Young vs. Bruce*, 5 *Litt.* 324; *Singleton vs. Carrol, &c.*, 6 *J. J. Marshall*, 527.) The death of the slave is not within the purview of the covenant. If the slave came to her death by the act of Coates, he alone is responsible for the wrong, not Carney, the surety under the contract. The action must be in form *ex delicto*, according to our former as well as our present system of pleading.

The case of *Adams vs. Gardner* is not analogous to this. That was an action against two sub-bailees, by the owner of a slave, for negligence in regard to the property, by which it was lost to the owner.

If this view of the case be correct, it follows that Pettit is discharged from liability in this suit. But if Carney should be regarded as responsible, still it is insisted Pettit is not liable. He denies that at or after the service of process he had anything in his hands belonging to Carney, by an affidavit filed in court. The plaintiff undertook to prove that he had, but the evidence does not show that he had. (See *Code Prac., Title 8, sec. 245—8.*)

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3. The chancellor had not jurisdiction of the case. The matters should all have been referred to a jury in a suit upon ordinary petition.

B. & J. Monroe for appellants—

Little remains to be said on the part of the appellants. 1. It is difficult to come to the conclusion that the Code of Practice will warrant the uniting of two parties, having two distinct causes of action—the one on contract, the other in tort—in the same suit for redress of their respective injuries. The Code does use the term “That every suit shall be prosecuted in the name of the real party in interest,” but the application of that provision of the Code to this case is denied. Here the interest of Payne, who hired the negro to Coates, is one thing and the recovery of the price of the negro killed by Coates, which belonged to Walden, is another thing, each distinct causes of action in favor of different individuals, who have united in the same petition in equity. It is not sanctioned by the Code, (*chap. 1, sec. 30.*) nor is it perceived how *section 3, of the same article*, can be made to apply, which provides “that all persons having an interest in the subject of the action, and in obtaining the relief demanded, may be joined as plaintiff, except, &c.” Walden had no interest in recovering the hire in this case; Thompson and Payne were bound for that. She might sue Coates for the value of the negro, which was her property. Thompson & Payne had no interest in this recovery except so far as it might incidentally exonerate them from responsibility for that value.

2. Can the judgment in this case be sustained. There are two distinct judgments—one on behalf of Thompson & Payne for \$65 and interest, for the hire of the slave, and another in behalf of Walden for the value of the slave. If these parties had an identity of interest should not the judgments have been in behalf of all? If they had not does not that

show the impropriety of joining the parties and the causes of action?

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M. Mayes for appellees—

The appellees insist that the judgment is substantially correct, at least there is no error of which the appellants can complain. It is clearly proved that the negro woman came to her death by violence from the hands of J. T. Coates; that she was the property of Lucy Walden; that Coates hired her for the year 1853 at the price of \$65, and bound himself to pay the hire and return the slave, and that B. Carney was his surety for the hire and return of the slave. Carney contends that he is not bound for the value of the slave, as she was killed by Coates. The covenant is positive, and it cannot be that he is exonerated from the delivery of the slave, unless it is made to appear that the slave came to her death without any fault on the part of either Coates or the surety. "A bailee of a slave is bound to ordinary dilligence in regard to the health, safety, &c., of the slave, and is responsible for ordinary negligence, as in all cases of bailment for hire." (7 B. Monroe, 662.) Carney was bound by the covenant to the same extent as Coates, his principal. Surety was demanded because Coates was not regarded as sufficiently responsible, and Carney was received.

But it is contended that Carney is not responsible to Lucy Walden, but to Thompson & Payne alone. Lucy Walden was the owner of the slave, and directly interested. Thompson & Payne hired the slave from her, and then hired to Coates and Carney. "A bailee for hire is bound to ordinary care and dilligence in the preservation of the thing hired. If he transfer the possession, still being bound to the owner, the transferee may be responsible." (13 B. Monroe, 199.) "He who assumes the possession of another's property is bound by a general principle of law to use reasonable care for its preservation while in his possession, and is liable to the party injured for

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the want of such care,"—same case—which is a case in point, showing the right of Lucy Walden to maintain the suit. And by the provisions of the *Code of Practice*, secs. 34, 38, "may be joined with others having an interest in the subject of the action."

Carney being liable in this action, is there any error in the judgment against Pettit? This suit was instituted on the 16th February, 1853. Pettit was served with process on the 31st of March, 1853; his answer filed on the first day of September, 1853. in which he says that at the time the process was served on him he had not, nor had he at the time of answering, any property or money in his hands belonging to B. Carney, and that he is not indebted to B. Carney, and was not indebted to Carney at the commencement of this suit. There is a manifest intent to answer truthfully, but evasively. It was after the bringing of the suit and suing out of the attachment that Pettit bought the negro man. He may not have owed Carney when the suit was brought, nor when he filed his answer, and been indebted to him in March when the amendment was filed. He does not deny being indebted to Carney after the suit was brought and before the answer was filed, nor when the process was served, but that he had no money or property in his hands of Barnaby Carney when the process was served. He does not deny the purchase of the negro at \$1,000, and his owing the money, and his knowledge of the pendency of the suit, with the attachment when he made the purchase, with a promise not to pay over the money until this controversy should be settled. He wholly fails to make any answer to the amended petition, in which these and other charges of fraud are made. The judgment against Pettit is clearly right.

The decree to subject the land is clearly right.—The proof shows a clear intent on the part of Carney to put his property out of the reach of any liability which might arise against him from his suretyship for Coates.

Judge SIMPSON delivered the opinion of the Court.

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The principal question in this case arises upon the writing executed by Coates, and Carney his surety, for the hire of a female slave, during the year 1853, which writing contains a covenant for the return of the slave at the end of the year.

It appears that during the year, Coates caused the death of the slave by inhuman treatment, and having immediately thereafter absconded, this action was instituted for the purpose of attaching the property of Carney, the surety, who, as alleged in the petition, was about to dispose of his property with the fraudulent intention of evading his liability for the value of the slave, and the hire.

The slave belonged to Lucy Walden, and had been hired by her to W. C. Thompson and R. W. Payne, for the year 1853, and they hired her to Coates, taking from him the writing referred to, with Carney as his surety, which writing was executed to Payne alone. The action was brought by a petition in equity, in the names of Walden, Thompson and Payne as plaintiffs.

On the part of Carney it has been argued, that it was not contemplated by the parties, when the contract for hiring was entered into, that he should be liable for the value of the slave in the event that his principal failed to return her according to the stipulation in the contract; and if he be held responsible, that it will in effect convert the writing into a contract of insurance, which was not intended by the parties to it when it was executed; and the cases of *Young vs. Bruce*, 5 Litt., 324, and *Singleton vs. Carroll, &c.*, 6 J. J. Marsh., 527, have been referred to, as sustaining the doctrine contended for.

But these cases only decide the principle, that such a covenant does not impose upon the covenantor an obligation to return the slave at the end of the term of hiring, in every possible state of case; but that if he, without any fault on his part, be rendered un-

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able to comply with the covenant, by the death of the slave, or by the fact that the slave ran away and could not be recaptured, although reasonable diligence had been used to effect that object,* then he will not be responsible for a failure to comply with it.

Can any obligor, however, rely upon his own wrongful act as an excuse for failing to fulfill his undertaking? The intervention of the act of God, or of the slave, or of the owner, which prevents him from complying with it, will excuse a non-performance of the covenant. But he is not entitled to any such exemption from liability, if he be rendered unable to comply with it by his own illegal and wrongful act.

The liability of the principal and the surety, upon the writing, is precisely the same. They are joint covenantors, equally bound for the performance of the covenant, and neither can exonerate himself from liability, on the ground that the wrongful act of the other has rendered a performance by him impossible. We entertain no doubt, therefore, of the liability of Carney upon the written contract, for the failure to return the slave.

1. Though the hirer of a slave will not be responsible for the value of a slave which he has bound himself to return at the expiration of the term of hiring, when he is prevented from doing so by the act of God, the slave, or the owner, yet he is responsible when his inability to return the slave arises from his own illegal and wrongful act.

2. The liability of the surety and the principal is the same; when the principal is bound the surety is also bound; the wrongful act of the principal will not exonerate the surety.

An objection has been made to the proceedings in this case, on the ground that there is a misjoinder of parties as well as of causes of action in the plaintiffs' petition. It is contended in support of this objection, that so far as the action is founded on the written covenant, the owner of the slave is not a proper party; and that her cause of action against Coates for the value of the slave, is in *tort*, and cannot be joined with the other causes of action set forth in the petition, inasmuch as they are based upon contract.

This objection is founded on a misconception of the cause of action asserted by the petition. It sets forth a claim for the value and the hire of the slave on the written contract alone. The death of the slave, and that it resulted from the illegal conduct of one of the obligors, is alleged, to show their liability on their covenant for the value of the slave. The

action was an equitable proceeding; it was commenced before the cause of action had accrued, and its object was to prevent the defendants from making a fraudulent disposition of their property, before a breach of their covenant would occur, by a failure to pay the hire and return the slave at the end of the year. And the death of the slave, and the cause of it, were alleged to show that a breach of the covenant was inevitable, and consequently that the obligors were liable for the value of the slave.

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The bailee for hire is bound for ordinary diligence and care in regard to the health and safety of the slave, and is under an implied obligation to return the slave when the time of hiring has ended. (*Ewing & Conner vs. Gist*, 2 B. Monroe, 465; *Swigert, &c. vs. Graham*, 7 B. Monroe, 663.)

He cannot relieve himself from these obligations by hiring the slave to another person. Such hiring will be at his peril, and he will be responsible to the owner for any injury to the slave, or to the rights of the owner, which may result from the illegal conduct of the person to whom he has hired the slave.

In this case Thompson and Payne were liable to Lucy Walden for the value of the slave, inasmuch as Coates, to whom they had hired her, had caused her death by bad treatment. Thompson had a right to join in the suit as a plaintiff, because although the writing was executed to Payne alone, it was for their joint benefit. The action was brought by them to recover the value of the slave and the hire, for both of which the defendants were liable on their contract. The plaintiffs Thompson and Payne, being liable to Lucy Walden for the value of the slave, she was made a plaintiff in the action with them, because to that extent the action was brought by them to obtain indemnity for their liability to her, and was intended by them to inure to her benefit. If, instead of making her a co-plaintiff with them, they had merely stated that the action, to the extent of the claim for the value of the slave, was prosecuted for

3. When the object of a suit in chancery is to restrain the fraudulent disposition of property to avoid the payment of a legal liability which is inevitable, (as for inability to return a slave hired, arising from the act of the hirer,) the chancellor has jurisdiction to settle and adjust the whole controversy. And two persons having separate right to sue at law may unite in a petition in equity in such suit for the

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her benefit, there would have been no cause for the present objection. And as the facts alleged evince the nature of her right, and the extent of the liability of the other plaintiffs to her, and the action is evidently founded on the written contract alone, she should be regarded as having been joined as one of the plaintiffs, only because it was brought by the other plaintiffs for her benefit, so far at least as the value of the slave was sought to be recovered in it.—Viewing it in this light, it was an action by Thompson and Payne, on the written contract, for the hire and the value of the slave, and there was no misjoinder either of causes of action or of plaintiffs.

Pettit has no right to complain of the judgment against him. He bought the property of Carney after the attachment had been issued, and no doubt had the price of it in his hands at the time the process was served upon him. His answer is evasive and unsatisfactory; and he failed to answer the amended petition, in which it was expressly alleged that he had admitted the purchase of the property with a knowledge that the attachment had issued, and stated that he had not paid for it, and would not do so until this suit was determined.

Wherefore the judgment is affirmed.

Case 14.

Fisher vs. Kollerts.

Pet. Eq.

APPEAL FROM LOUISVILLE CHANCERY COURT.

1. The lien of the landlord upon property brought upon leased premises, is only upon the interest which the lessee has in the property. And by the 14th section of the statute, (*Rev. Stat.*, p. 441,) the exclusive lien of the landlord is confined to the produce of the premises, fixtures, household furniture, and to such other personal property as is acquired before the tenant takes possession. The 15th section of said act secures to the landlord one year's rent, against incumbrances given upon personal property after it is upon the

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premises, whether the rent accrue before or after the creation of the lien, and which shall not have been due more than four months. These periods of one year and four months have reference to the levy of the warrant.

2. The 14th and 15th sections of the act concerning landlord and tenant, are to be so construed as to harmonize, and the latter so qualified as to harmonize with the former; the species of property, therefore, which is described in the 15th section is subject to the exclusive lien under the same limitations as to the time when the rent in arrear becomes due, as that described by the 14th section, and for like reason the 19th and 20th sections.

The facts of the case are stated in the opinion of the Court. *Rep.*

B. Ballard for appellant—

Argued : 1. That a landlord cannot under any circumstances distrain for rent which has been due more than six months. (*Rev. Stat., Title Landlord and Tenant, sec. 11.*)

2. As against a mortgagee or other *bona fide* lien holder, he cannot distrain for rent which has been due more than four months. (*Rev. Stat., Title Landlord and Tenant, sec 14.*)

3. That as against such lien holder, he can distrain only certain property of the tenant—that is to say, the produce of the premises occupied by the tenant, the fixtures, the household furniture, or such other of his estate as was acquired before he took possession of the premises ; on all other property of the tenant the lien of the mortgagee must prevail over the landlord. (*Rev. Stat., Title Landlord and Tenant, sec. 14; 3 Dana, 212.*)

4. That as against such lien holder, the landlord can never distrain for more than one year's rent.

5. That the landlord may distrain for one whole year's rent, provided it was due within four months before the creation of the lien ; or he may distrain for the year's rent falling due next after the creation of the lien.

6. That though the statute speaks of a year's rent, or as if rent were payable not otherwise than yearly, yet as the statute forbids a distress, as against a

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mortgagee, for any rent which has been due more than four months, it follows that if rent be payable monthly, a distress warrant cannot issue for more than four months' rent, though a whole year's rent be in arrear.

7. That an officer levying an execution or attachment on the produce of a tenant's farm, or on his fixtures, his furniture, or any of his personal estate acquired before his tenancy commenced, must pay to the landlord the year's rent in arrear which became due before the levy of the execution or attachment. (*Rev. Stat., Title Landlord and Tenant, sec. 20 and 14; 2 Dana, 209; Bradley on Distress, 118; 1 Strange, 97; 9 B. Monroe, 128; 18 John., 1.*)

8. If the levy be on the property of the tenant, except as above mentioned, he is not bound to pay the rent.

9. If the levy be upon some of the above described property, and on other property, the party levying is only bound to pay the landlord the proceeds of the property to which his lien attaches, though it fall short of his demands for rent.

10. If the rent be payable monthly, and not yearly, then the officer is bound to pay the landlord only so much of the rent as was due four months next preceding the levy, though a whole year's rent may be due.

11. To entitle the landlord to remedy against an officer or attaching creditor, he must give notice of his lien, and demand his rent, before the sale of the tenant's effects.

12. In this case, as the year's rent accruing when the mortgage was executed, was paid, the landlord has no recourse as against the mortgagee. (*See Rev. Stat., Title Land. and Ten., sec. 14 and 19.*)

J. Harrison for appellee—

The only question arising in this case is as to the validity of the landlord's lien for rent.

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Kollerts rented a tenement, in Louisville, of Stilwell, and after entry and the commencement of the last year's tenancy, Kollerts mortgaged his merchandise and furniture to the appellant, who is his mother-in-law. Nearly twelve months afterwards she filed her petition to foreclose the mortgage, and attached the effects. No defense being made, the attachment was sustained, and a decree for sale of the attached effects. On the same day that the attachment issued, Stilwell sued out a distress warrant, which was also levied on the attached property. The marshal took possession of the attached effects, and retained the possession of the premises until the sale of the attached effects. Stilwell died before the sale; White, his administrator, filed his petition to be made a party to the suit, and was made a party, and filed his answer, and proved the amount of rent due.

The appellant insists that her lien is superior to that of the landlord. At the date of the mortgage Kollerts and his effects were upon the rented premises, and it does not appear from the pleadings or proof that any of the effects were acquired after entry.—The mortgage does not specify the articles intended to be embraced—it is general in its terms—and the proof does not identify the property attached as that embraced in the mortgage. The attachment was not sustained by proof, and as there was no defense by Kollerts, and Stilwell nor his administrator before the court, the proceeding may be regarded as agreed between the appellant and Kollerts.

The attached effects are clearly insufficient to pay the debt claimed by the appellant. Had there been other effects it is to be presumed they also would have been taken—at least a sufficiency to pay appellant's demands.

There was no impropriety in the levy of the distress warrant upon the attached effects, whether subject to the attachment or not. If the attachment should fail, the levy under the distress warrant would hold; or if the lien of the distress warrant is supe-

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rior, it will be a valid levy. If the lien of the landlord exists it existed before the levy of the attachment, and cannot be defeated by it or by the mortgage. The *Rev. Stat., Title Land. and Ten., sec. 11, p. 441*, authorizes the issue of a distress warrant within six months after it becomes due. Section 12 authorizes the levy of a distress warrant on any personal estate of the lessor found on the premises, or which may have been removed within fifteen days. Section 15: If such estate when carried upon the premises shall be subject to a valid lien, the lessee's interest in such property shall only be liable to distress. Section 14 gives the landlord an exclusive lien on the produce of the farm or premises rented, or the fixtures and furniture of the tenant, and on such other of his personal estate as is not acquired after he takes possession of the premises—gives a lien for no more than one year's rent, and only for that which has not been due more than four months. Section 16 permits the levy of a distress warrant on any property of the lessee, in or out of the county where the premises are situated, for fifteen days after the removal of the property from the premises, and protects a *bona fide* purchaser. Sections 15, 19, and 20, provide that *bona fide* liens given on property whilst on the premises, is still liable to distress for one year's rent, which may accrue before or after the giving such lien; that the person acquiring such lien after the tenancy commences, may remove such property by paying the rent in arrear, or securing the amount due, not exceeding one year's rent. Officers levying on property so situated are to pay rent due to the same extent.

The object of the legislature clearly appears to be to secure to the landlord one year's rent.

The case of *Snyder vs. Hitt*, 2 Dana, 204, has no bearing upon this case—the facts are different; nor has that of *Fry vs. Breckinridge*, 7 B. Monroe, 35. In that case this court said that the levy of a distress warrant after sun down is not warranted, “unless

under special circumstances," &c. It happens in this case that such circumstances existed as authorized the levy of the distress warrant after sun down, and no inconvenience resulted to the tenant as depicted in the case cited.

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The fact that the proceeds of the sale of the property is in the hands of the court, cannot affect the right of the landlord; the chancellor will dispose of the funds according to the rights of the parties interested. The attachment could not affect prior liens, and Stilwell having a prior lien for rent, before the mortgage and attachment, should be protected.

Chief Justice MARSHALL delivered the opinion of the Court.

December 22.

On the 23d day of August, 1854, Kollerts, then occupying a business house in Louisville, under a lease from Stilwell, mortgaged to Mrs. Fisher, to secure a debt of \$600 due twelve months afterwards, besides a few articles of household furniture, the fixtures in his store, and all his stock of cloth and ready-made clothing therein. On the 6th of October, 1855, Mrs. Fisher filed her petition claiming said debt of \$600, and \$150 in addition, and referring to the mortgage, and upon the averment that Kollerts was about to sell and dispose of his property with the fraudulent intent to cheat, hinder, and delay his creditors, prayed for an obtained and attachment, which, on the same day, was levied by the marshal on the furniture and fixtures of the defendant on the demised premises. On the same day, after the levy of the attachment, and after the sun was down, Stilwell sued out a distress warrant for \$344 20, as rent of the house referred to up to the 1st day of October, 1854, due and in arrear, and payable in money.—The distress warrant was levied on the same evening on the attached goods in the hands of the marshal; but the proceedings on the distress warrant, and the claim of rent, were not noticed in the attachment suit until the 15th of December, 1854, prior to

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which time a sale of the attached goods, ordered on the 20th of October, had been made and reported, and the proceeds, in the form of cash and bonds, were in court. On the 15th of December, 1854, the administrator of Stilwell filed the claim for rent, evidenced by the distress warrant and the return of its levy, and an accompanying affidavit in support of the claim. On the 9th of March, 1855, the plaintiff was ordered to make Stilwell's administrator a defendant, which was done by amended petition, filed on the 23d of that month, and on the same day the administrator filed his answer, denying that the attached goods were included in the mortgage, which had been alleged for the first time in the amended petition, and claiming the prior lien for the rent. The answer states that the house was rented at \$350 a year, and that on the 1st of October, 1854, \$344 20, subject to a credit of \$4, were due for the rent of one year preceding that date, and that the marshal had retained possession of the house for one month, (for the purposes of the attachment,) and \$29 15 are claimed on that account, making altogether \$369 35 claimed out of the proceeds of the attached goods then in the possession or under the control of the court.

It was proved that Kollerts had been in possession of the house from the 1st of July, 1850, under a rent of \$350 a year, payable monthly, and that on the 1st of October, 1854, \$344 20, subject to a credit of \$4, were due. The court decreed to the administrator \$369, with interest from the 1st day of November, 1854, to be first paid out of the fund in court, and that the plaintiff Fisher might withdraw the residue, which being insufficient to satisfy her demand, she has appealed to this court, complaining of the postponement of her demand.

The question of priority is to be determined by the Revised Statutes on the subject of landlord and tenant, the 2d article of which, from the 1st to the 20th sections inclusive, contains the provisions applicable

to the subject. The 11th section allows distress to be made for rent at any time within six months after it becomes due, and not afterwards. The 12th section authorizes the levy of the distress or attachment for rent upon any personal estate of the lessee or his assignee or under-tenant found on the premises, or which may have been removed within fifteen days, and make the distress or attachment binding upon such estate, which is understood to give to it a lien from the time it comes to the officer's hands. The 13th section provides that if such personal estate, when brought upon the premises, be subject to a lien valid against the creditors of the lessee or assignee, his interest only shall be subject to distress or attachment. The 14th section confines the exclusive lien under the warrant (of distress or attachment)—1st. To the produce of the premises. 2d. To fixtures. 3d. To household furniture; and 4th. To such other personal property as is acquired before he takes possession, and denies such lien for more than one year's rent due or to become, and for any rent which has been due more than four months. The 15th section provides that if a *bona fide* lien be created upon the personal property while it is on the demised premises, the property shall be subject to distress or attachment for not more than one year's rent, whether it shall have accrued before or after the creation of such lien. The 16th, 17th, and 18th sections need not be stated. The 19th section provides that if after the commencement of the tenancy a lien be created on the property liable for rent on the premises, the party making or acquiring the lien may remove the property from the premises by paying of the rent, so much as is in arrear, and securing so much as is to become due, not exceeding, altogether, one year's rent, and not otherwise. The 20th section provides that if the property found on the premises be taken under an execution or order of sale or attachment, the rent, payable in money, not exceeding one year's rent in arrears, shall be

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1. The lien of the landlord upon property brought upon leased premises is only upon the interest which the lessee has in the property. And by the 14th section of the statute. (*Revised Statute, p. 441.*) the exclusive lien of the landlord is confined to the produce of the premises, fixtures, household furniture, and to such other personal property as is acquired before the tenant takes possession. The 15th section of said act secures to the landlord one year's rent, against incumbrances given upon personal property after it is upon the premises, whether the rent accrue before or after the creation of the lien, and which shall not have been due more than four months. These periods of one year and four months have reference to the levy of the warrant.

2. The 14th and 15th sec-

paid by the officer out of the proceeds of such property.

The first remark to be made on these sections is that while all the personal estate of the tenant found on premises is liable to distress, the exclusive lien of the landlord, under his warrant, is confined to certain property described in the 14th section, and is limited to one year's rent due and to become due, and does not exist as to rent which has been due more than four months, although there may be a distress warrant for any rent which has been due for more than four and less than six months. 2d. As by the 14th section the exclusive lien of the distress warrant is confined to certain property, its priority, except as derived from its being levied or having come to the officers hands before any other lien has attached, is, under the 14th section, confined to the same property; and if there be other property the landlord has no exclusive lien upon it, and therefore any lien existing before and at the date of the warrant upon such other property must, according to this provision, prevail against the warrant; and even the exclusive lien of the warrant cannot prevail except for one year's rent, nor for any rent which has been due more than four months. These periods of one year and of four months are understood to refer to the date or levying of the warrant, and substantially to the time when the conflict commences, by the assertion or attempted enforcement of one of the opposing liens. 3d. Under the 14th section there being no exclusive lien in favor of the landlord's warrant—that is, no lien independent of its date except upon the designated property—it follows that if before the date of the warrant an adverse lien, by other process, be created upon the tenant's property, though on the demised premises, such adverse lien is entitled to the precedence, except to the extent of the exclusive lien as defined in the section.

But the very next section declares that if a *bona fide* lien be created on the tenant's personal estate,

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while on the premises, the estate shall be liable to distress or attachment, but not for more than one year's rent, referring, as we understand, to one year either ended or current at the time of conflict. It would seem, from this provision, that the adverse lien created while the property is on the demised premises, must, to the extent of one year's rent due or accruing, yield absolutely to the distress or attachment, which, if this be so, has all the effect of an exclusive lien, without regard to the specific articles of property involved in the conflict, or to the time when the rent may have become due, although the immediately preceding section declares that there shall be no exclusive lien except upon specially defined property, nor for any rent which has been due more than four months. The two sections understood literally are absolutely irreconcilable, and they can only be made consistent with each other by understanding the words of one or the other in a qualified sense, and thus producing a modification of one or both, which shall make them harmonize. The specific language and provisions of the 14th section do not, while the more general terms and provisions of the 15th section do, admit of such qualification as would produce this effect; and as the order in which the sections are placed authorizes the inference that the ideas and principles which were definitely fixed and distinctly expressed in the 14th section, were still in the minds of the framers of the statute when they drafted the 15th, we think the latter should be so qualified as to accord with the principles of the former, rather than to nullify or disregard the distinct and precise discriminations of the former. We therefore construe the 15th section as relating to the same description of property or estate which is described in the 14th as subject to the exclusive lien, and consider it as continuing, impliedly and necessarily, the same limitation as to time within which the rent in arrear must have become due, in order to entitle it to the preference declared by the 15th section. And

tion of the act concerning land lord and tenant are to be so construed as to harmonize; and the latter so qualified as to harmonize with the former. The species of property, therefore, which is described in the 15th section is subject to the exclusive lien under the same limitations as to the time when the rent in arrear becomes due, as that described by the 14th section, and for like reason the 19th and 20th sections.

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for similar reasons we construe the 19th section, when speaking of property liable for rent, and postponing, for the benefit of the landlord, the adverse lien created during the tenancy, as referring to property upon which there is an exclusive lien under the 14th section. The 20th section is susceptible of a similar construction, and should receive it. A different construction would lead to the absurd consequence that although the landlord cannot, by distress, exclude or postpone any existing adverse lien, except as to particular property, nor even then for more than one year's rent, nor for any rent which has been due more than four months, he is yet entitled, as against all opposing liens upon every kind of personal estate upon the demised premises, to the same exclusive benefit; and if the limitation of four months be not applied to a greater lien with regard to property, as to which he has no exclusive lien. There can be no reason for restricting his lien under his warrant to certain property, and yet making it superior as to all property on the premises, to any other claim or lien asserted by another.

In this case the answer denies that the attached property is included in the mortgage, and there is no proof nor presumption that it was acquired before the tenancy commenced. The administrator therefore could not, under our construction of the statute, have been entitled to precedence, on account of his demand against Kollerts, except as to the proceeds of the fixtures and of the furniture, if any, on the demised premises; and as these proceeds, together with the rent accruing after the attachment, for which he is also entitled to precedence, are much less in amount than the sum decreed, the decree is, to the extent of this difference, erroneous.

Wherefore the decree is reversed, and the cause remanded for a decree in conformity with this opinion.

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ORD. PET.

APPEAL FROM JEFFERSON CIRCUIT.

1. A replication to the plea of the statute of limitations, in an action of assumpsit, averring that the defendant assumed to pay in 1841, and immediately thereafter removed to Missouri, and there resided until 1847, and did not return to Kentucky, except occasionally passing through it without the plaintiff's knowledge, whereby plaintiff was obstructed from bringing his suit, presents a valid answer to the plea of the statute of limitations of 1796.
2. A promise made after the consideration of the first promise has been advanced, in consideration of the indebtedness, may be averred and relied upon, and the limitation in such case will commence from the last promise; and if the plaintiff be obstructed in bringing his suit by the removal of the party from the country, the effect of limitation will be suspended during such obstruction.
3. A party cannot complain of an instruction to the jury by which he could not have been prejudiced.

The facts of the case are stated in the opinion of the court.—*Rep.*

Bullard for appellant—

This action of assumpsit is brought on an account. Pleas, the general issue and the statute of limitations. The replication to the plea of the statute of limitations is designed to bring the case within the proviso contained in the 9th section of the act of 1796, which is in these words: "Provided, that if any person or persons, defendant or defendants to any of the aforesaid actions, shall abscond or conceal themselves, or by removal out of the country or the county where he or they do or shall reside when such cause of action accrued, or by any other indirect way or means defeat or obstruct any person or persons who have title thereto, from bringing or maintaining all or any of the aforesaid actions, within the respective times limited by this act, that then and in that case, such defendant or defendants are not to be admitted to plead this act in bar to any of the aforesaid actions,

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anything in this law in anywise to the contrary notwithstanding."

1. The appellant says the court erred in overruling the demurrer to the plaintiff's replication to the plea of the statute of limitations. It does not appear from the replication that this suit was brought within such time after the return of the defendant to the State as, when added to the time which had elapsed before her departure, and after the right of action accrued, would show that the right of action was saved.

2. The replication is defective in this also, that it is not averred that the plaintiff was obstructed in bringing his suit by defendant's removal to Missouri.

3. The replication alleges a promise to pay, and then an immediate removal from the state. The plaintiff then knew of the removal, and was not prevented by it from suing, but by the promise to pay. It farther shows that the defendant returned, and upon the return the statute commenced to run. (*Chitty on Com.*, 809, and cases cited.) The plaintiff alleges such facts as show that he was not prevented from suing. The replication is too indefinite. Plaintiff says he was obstructed from suing within five years. What five years is meant? Five years from the accrual of the action, or five years from the removal, or from her return? If her return, what return? She returned more than once, as the replication avers. Does he mean within five years from defendant's return *plus* the time which elapsed after the action accrued before her departure.

4. Assuming the replication to be good, the facts do not sustain the finding of the jury. The witness who had come to Louisville to sue, says he did not sue because defendant paid part of the account, and promised to pay the remainder. In the case of *Wilson vs. Koontz*, Chief Justice Marshall, in deciding on the proviso under consideration in the Virginia statute, said: "It seemed essential under that section that the complainant should have been actually de-

feated or obstructed in bringing his action, by the removal of the defendant."

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Is the removal here such as is meant by the statute? It is not alleged to have been a fraudulent removal, which was evidently intended by the statute from its connection with the terms "abscond and conceal." A mere removal is not sufficient; the party must be obstructed in his suit. (*Ormsby vs. Letcher*, 3 *Bibb*; *Prather vs. Ross*, 10 *B. Monroe*; *Sneed vs. Hall*, 2 *A. K. Marshall*.)

The plaintiff is bound to show in what manner he was obstructed by defendant's removal. It is not every removal that is an obstruction within the contemplation of the statute.

The court erred in its instructions to the jury, conceding that a fraudulent promise of payment would be a valid excuse for not suing, (which is not however admitted.) It is obvious that for a party to rely upon it he should plead it; and the plaintiff, after having plead and relied on *removal* as an excuse for not suing, could not prove that he was obstructed in any other way.

J. Hurlan on the same side—

I will add a few suggestions in addition to what has been said by adjunct counsel:

1. As to the instructions moved by the defendant and refused by the court.

The second instruction moved by the defendant is in these words: "If plaintiff knew of defendant's intention to remove to Missouri, he was not *obstructed* by the removal from bringing suit."

The 9th section of the statute of limitations of 1796 (2 *Stat. Laws*, 1139.) provides, among other things, that a removal out of the *country*. (which has been construed removing out of the *state*.) will prevent the statute of limitations from running against the claim of the creditor. Now, it seems to me if the plaintiff *knew* of the *intention* of the defendant to remove, and failed to avail himself of his right to institute his ac-

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tion, he cannot claim the benefit of the section referred to.

The 3d instruction is—"If the jury believe the defendant's home has been in Kentucky for five years before the institution of this suit, they must find for defendant."

The court refused to give this instruction, and the ground of refusal is not perceived by me. The instruction No. 3 given by the court, is in effect the same except the court required that plaintiff should have had *knowledge* of the fact. There is no such requisition in the statute. In *Sneed vs Hall* (2 Mur., 22,) it was decided that a removal from one county to another in this state, did not prevent the statute from running. Nothing was said in that opinion about the knowledge of plaintiff. The defendant was under no obligation to give plaintiff notice of her return to Kentucky. If she were a citizen and resident of this state for five years prior to the institution of this action, did she not enjoy all of the privileges and rights of every other free man and woman?

It seems to me that the court erred in refusing to instruct the jury as prayed for in No. 3, and in modifying it in the manner just stated.

In the instruction No. 2, given by the court, the *promise* by the defendant is assumed to be an *obstruction* to the institution of an action. The defendant was at Louisville on the soil of Kentucky, but the plaintiff could not sue because of an *obstruction* placed in his way, which consisted of a *promise to pay*. It requires no argument to show the absurdity of such a position. There is some contrariety of evidence whether the defendant went to Missouri with the intention of settling there and becoming a permanent citizen, or on a visit; but be that as it may, it is very certain she was very frequently in Kentucky, and liable to the process of its courts. The circuit judge again interposes the word *knowledge*, and instructed the jury (in instruction No. 4) that unless plaintiff had *knowl-*

edge of the visits of defendant, the statute did not run against his claim. This instruction was also erroneous.

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The other errors relied upon for the reversal of the judgment have been fully noticed in Mr. Ballard's brief.

S. Williams for appellee—

The proof clearly proves the justice of the appellee's demand. The appellant relied solely upon the statute of limitations. The proof of appellee shows clearly that immediately after the express promise to pay the account, that the defendant left the state, and only returned occasionally as a visitor, and of such visits it is not shown that appellee had notice. She remained absent for six or seven years. Upon her return, before five years had expired, excluding the term of her absence, this suit was brought. The whole case must turn on the construction to be given to the 9th section of the act of 1796, (2 *Stat. Law*, 1139.) The construction given by the circuit court was correct, and the case was correctly decided as to the law and the justice of the case. The instructions were hypothetical, and left the jury to decide the facts. They were correctly decided, and the judgment of the circuit court is right.

Chief Justice MARSHALL delivered the opinion of the Court.

December 22.

This action of assumpsit was brought in December, 1850, by William Price for William C. Price against Jane B. Ridgeley. The counts are in *indebitatus* assumpsit for money paid, loaned, and advanced by the plaintiff to and for the defendant, at her request, in consideration of which they aver that she promised to pay, &c. The defendant pleaded non-assumpsit, and also that the cause of action had not accrued within five years before the commencement of the action. The replication to the second plea states, in substance, that in the beginning of the year 1841 the defendant in this state, and while

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residing here, promised the plaintiff to pay his account in consideration of her then owing it, and thereupon immediately removed out of this state to the state of Missouri, and resided there, and continued out of this state, except as she occasionally passed through it, without the knowledge of plaintiff, and when he could not sue, until the summer of 1847, when she returned. Plaintiff says he was all the time obstructed, by said removal, from bringing his suit within five years, and that he now has right to maintain his suit, and had when he brought it.

A demurrer to this replication was overruled, and the defendant rejoined, and as we presume tendered issue, and a verdict and judgment having been rendered in favor of the plaintiff for \$462 13, the defendant brings up the case for the revision of this court, complaining that the circuit court erred in overruling the demurrer to the replication, and also in giving and refusing instructions. We shall first notice the question arising on the demurrer, premising that upon the face of the record, and upon inspection of the copies of the replications certified, the replication as above set forth is that which was sustained upon demurrer, and on which the parties went to trial.

1. A replication to the plea of the statute of limitations, in an action of assumpsit, averring that the defendant assumed to pay in 1841, and immediately thereafter removed to the state of Missouri, and there resided until 1847, and did not return to Kentucky, except occasionally passing through it without plaintiff's knowl

1. A good replication, which does not traverse the plea, must sustain the cause of action on which the declaration is founded, by averring new matter which avoids the effect of the plea; or if the plea, apparently answering the declaration, has mistaken the real cause for which the action was brought, a new assignment may be made. But in actions of assumpsit, upon promises expressed or implied, to pay money, although there may have been, successively, two express promises, or an implied and an express promise, founded on the same consideration of indebtedness, and for payment of the same debt, a general plea of non-assumpsit within five, or *actio non accervit* within five years, does not require a new assignment to authorize the plaintiff to rely upon

the subsequent promise, when the terms of the declaration apply as well to that as to the preceding or original one. It has, therefore, always been held to be a sufficient answer to such a plea for the plaintiff to reply a promise within five years ; and the action will be sustained by proving such a promise, although the original indebtedness accrued more than five years before the action, and although the action, if there had been no plea of the statute of limitations, might have been sustained by proof of the original indebtedness, without proving the subsequent promise. And the same replication and proof, if the statute be relied on or the same proof, if there be no plea of the statute, are sufficient and effectual, although the original indebtedness and promise had in fact been barred by the statute before the new promise was made.

2. This mode of proceeding in case of the statute being pleaded, may be allowed in England, on the ground that the new promise is not the real cause of action, but is only evidence that the original debt still subsists, and thus relieves it from the bar of the statute. But the statute, although founded perhaps upon presumption, is not regarded in this state as a mere rule of evidence, the effect of which may be repelled by other evidence which tends to disprove the presumption on which the rule is founded. It prescribes an imperative rule, by which every cause of action is absolutely barred by the lapse of five years without suit, unless the delay is the consequence of one of the causes which the statute itself enumerates as constituting exceptions to the rule. In this view of the statute this replication of a promise within five years is good only upon the ground that it is understood as implying and as equivalent to the averment that the action is founded upon this promise, which, if made within five years, and upon sufficient consideration—that is, in consideration of the original indebtedness—will, according to universal practice and precedent, suffice to sustain it,

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edge, whereby plaintiff was obstructed from bringing his suit, presents a valid answer to the plea of the statute of limitations of 1796.

2. A promise made after the consideration of the first promise has been advanced in consideration of the indebtedness, may be averred and relied upon, and the limitation in such case will commence from the last promise; and if the plaintiff be obstructed in bringing his suit by the removal of the party from the country, the effect of limitation will be suspended during such obstruction.

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3. A party
cannot com-
plain of an in-
struction to the
jury by which
he could not
have been pre-
judiced.

whatever period may have elapsed after the original promise.

In this case the declaration is in the general form of *indebitatus assumpsit*, being blank as to the dates of the indebtedness and promises alleged. It therefore applies precisely as well to the promise stated in the replication as to any previous promise express or implied, founded upon the same consideration; and as in connection with the original consideration, that promise certainly constituted a good cause of action, which, under any construction of the statute, might be successfully asserted by suit within five years from its date, there is no reason why the action should not in this case be regarded as founded upon the same promise specified in the replication. It certainly may, and as we think, should be so regarded. And being a new cause of action, distinct from the original cause, though founded upon the same consideration, and being the very cause of action on which this action is brought, it is not affected by the previous lapse of time, running from the date of the original indebtedness, but itself forms a new event for the commencement of the bar by the statute; and as this new cause of action would be barred by the lapse of five years, without accounting for the delay by some cause made sufficient by the statute to exempt the case from its operation, so it is saved from the bar by showing such cause for the delay.

3. If then the replication had stated the promise to have been made in 1847, that being within five years before the action, would have been sufficient as showing a cause of action not barred by time; but as it states a promise made more than five years before the action, and which therefore was not alone sufficient, it was necessary to state additional facts which would prevent the operation of the bar against the cause of action, as specified in the replication, and which is taken to be the same on which the action is founded. Are the facts stated sufficient for this purpose?

The object of the replication is to bring the case within the 9th section of the general act of limitations of 1796, (*Statute Law*, 1113,) and especially within the provision which declares, in substance, that a defendant who, by removal from the county or country of his residence, or other indirect means, shall defeat or obstruct the person entitled from bringing or maintaining his action, shall not be admitted to plead the act in bar of such action.

In the case of *Ormsby vs. Letcher*, 3 *Bibb*, 270, it is explicitly stated that a removal subsequent to the accrual of the cause of action, may cause such an obstruction as is referred to in the 9th section, and may save the action although the statute may have commenced running before the obstruction was interposed. And in the case of *Prather vs. Ross*, 10 *B. Monroe*, 16, it was held sufficient, under a proviso precisely similar, for the replication to aver that when the cause of action accrued the defendant resided in the county of M., and had obstructed the bringing of the action by removing from that county before the period of limitation had elapsed. The replication before us states that immediately upon the making of the alleged promise the defendant removed from this state, where she resided, to the state of Missouri, and resided there, and continued out of this state, except until the summer of 1847, and that the plaintiff was obstructed all the time, by said removal, from bringing the action within five years, which must be understood to mean within five years from the accrual of the action; and leaving out the exception the replication is considered as bringing the case within the proviso, as interpreted by the two cases referred to, and as being according to the last case sufficient in its form. However short the interval may have been between the making of the promise and the removal from the state the promise was made, and the cause of action accrued in this state, and as the action upon it might have been brought in time but for the removal, the removal was an ob-

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struction to it. Whether the plaintiff intended to sue immediately or not is immaterial; he was not precluded from doing so by any act of his, and he might have sued at any time within five years if it had not been for the removal of the defendant.

4. Assuming then that a removal and continuance out of the state is such an obstruction as, while it exists, prevents or suspends the operation of the statute by bringing the case within the saving of the 9th section, it cannot be doubted that such removal, immediately after the accrual of the cause of action, and a continuance out of the state until 1847, which was within five years before the commencement of the suit, would take the case out of the limitation, and leave it unaffected by the bar of the statute.— But this replication admits that the defendant during her alleged residence in Missouri was occasionally in this state, but says it was without the plaintiff's knowledge, and that he could not sue until her return, &c., and that he was, by her removal, obstructed all the time from bringing his suit within five years. And the question is whether the fact that the defendant was temporarily in Kentucky, on one or more occasions, but without the knowledge of the plaintiff, is such a removal of the obstruction occasioned by the defendant's having removed from, and her residence out of the state, as to take the case out of the proviso or exception of the statute, and to make a new point for the commencement of the limitation whenever the defendant entered the state, notwithstanding the plaintiff's ignorance of the fact which, had he known it, would have enabled him to sue. We are of opinion that if the plaintiff was in fact ignorant, without fault, of the occasional visits of the defendant to this state, he cannot justly be said to have had an opportunity of suing her, and the obstruction occasioned by her removal still continued, and repelled the operation of the bar. The proviso in the 8th section of the statute, in favor of the person entitled to the action, and who may be out of

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the country, expressly subjects him to the limitation on his return to the country. The suspension in his favor is founded on a supposed disability to sue while he is out of the state; and the disability being with his presumed knowledge removed by the mere fact of his coming into the state, his failure to sue becomes from that time mere *laches*, which the statute does not intend to assist. But when the defendant, by removal from the state, prevents or obstructs the bringing of the action, the saving of the plaintiff's right from the effect of the bar would be utterly delusive if the mere presence of the defendant in any part of the state, however distant, for however short a time, and although wholly unknown to the person having the right to sue, might, without *laches* on his part, deprive him of the benefit of the saving. Until he knows, or ought to know, that he can sue, he is guilty of no neglect, and the privilege or saving caused by the act of the other party ought not, and in our opinion was not intended to be taken away.

5. We are of opinion, therefore, that upon the face of the replication the averment that the plaintiff, notwithstanding the admitted presence of the defendant in Kentucky without his knowledge, was, by her removal, obstructed from bringing his action all the time of her residence in Missouri, until her return to Kentucky, which was within five years before the commencement of this suit, is not only justified by the facts stated, but constitutes *prima facie* a sufficient answer to the plea. And the jury having, upon evidence clearly sufficient to sustain the truth of this replication, (since the promise proved though variant in terms, is not variant in legal effect from the promise alleged,) found a verdict in favor of the plaintiff for a sum also authorized by the evidence, the only remaining question is, whether there was any error in giving or refusing instructions? Upon this question it is sufficient to say, that the opinions of the court in giving and refusing instructions, so far

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as they relate to the effect of the defendant's removal from and her subsequent visit and final return to Kentucky, are founded on the same construction of the 9th section of the statute, which we have adopted, and are not erroneous in making the knowledge of the plaintiff necessary to deprive him of the benefit of the exception arising from the removal of the defendant to another state. And although the instruction relating to the effect of the promise stated in the replication, and proved to have been made immediately before the defendant's removal, does not give precisely the same operation to that promise that we have given, but allows the jury to consider it as a cause co-operating with the removal to obstruct the bringing of the action, which, upon the evidence, may have been the case, yet as the difference upon this subject was rather to the prejudice of the plaintiff than of the defendant, because it submitted the effect of the promise as a matter of fact instead of assuming it as a matter of law, and as it could not have affected the verdict to her injury, there is no available objection to the verdict on that ground.

Wherefore the judgment is affirmed.

A re-hearing was asked, but the petition was overruled.

Case 16.

Thomas vs. Thomas' Executor.

PET. EQ.

APPEAL FROM MADISON CIRCUIT.

1. Land was purchased of the husband which was the inheritance of the wife, conveyed by a deed by husband and wife to J. T., who afterwards conveyed to B.; but the first deed was not so acknowledged as to pass the wife's right. It was sold to a sub-purchaser and improved by him. After the death of the husband the wife sued for and recovered the land, which had been improved by the

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purchasers: Held that for improvements by which the vendible value of the land was increased, the widow was in equity bound to account, deducting the value of the rents accruing from the death of the husband. (*Bell vs. Barlow*, 1 Marsh., 246.) The principle is laid down in *Bell vs. Barnett*, (2 J. J. Marsh., 516,) that one who acquires title to land *bona fide*, and enters upon and improves it, supposing it to be his own, is entitled to compensation for improvements. The second purchaser in this case was not presumed to have known the defect in the certificate of acknowledgment.

2. The liability in such cases is to be measured by the increase in the vendable value of the land when recovered, arising from improvements.
3. Upon an answer by one defendant against another being made a cross petition against another defendant, process is necessary before decree.

The facts of the case appear in the opinion of the Court. *Rep.*

Hanson for appellant—no brief on file.

G. & R. Davis and *J. B. Huston* for appellee—

William Thomas, and Elizabeth Thomas his wife, attempted to convey by deed, to James Thomas, a tract of land belonging to the wife. James Thomas took possession, paid for the land, and afterwards sold it. Through several intervening conveyances George Thomas became the owner by conveyance from one Garner. George Thomas purchased in good faith, and made lasting and valuable improvements. He sold a portion to Beall, and a portion to Pace. Beall also made improvements. William Thomas having died, it was ascertained that his wife, who was the owner of the inheritance in the land, had not so acknowledged the deed to James Thomas as to pass her right, and suit was instituted against Beall and Pace, and the land recovered. This suit was brought against George Thomas' representatives on their covenant of warranty, and made Elizabeth Thomas a defendant, claiming compensation for improvements. George Thomas' representatives, in their answer, claim over against Elizabeth Thomas the value of the improvements put upon the land by George Thomas. A judgment was rendered in behalf of George Thomas' representatives for \$1,362

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76 for improvements, from which Elizabeth Thomas appealed.

The decree is right. The amount assessed is fair and reasonable. The vendee may recover for the improvements either from his vendor or the evictor. (1 *Domat's Civil Law*, *Cushing's edition*, 23, Title 2, sec. 10, sub-division 16; *Oldham vs. Wood*, 3 *Monroe*, 50; *Bright vs. Boyd*, 1 *Story*, 478, cited 2d *U. S. Eq. Dig.*; *Parham vs. Van Courtland*, 1 *Johnson's Ch. Rep.*, 277; *Barlow vs. Bell*, 1 *Marsh.* 246; *Bell vs. Barnett*, 1 *J. J. Marsh.*, 516; *Kennedy vs. Kennedy*, 2 *Alb. Rep.*, 571.)

December 24.

Judge STITES delivered the opinion of the Court.

William Thomas, and Elizabeth his wife, conveyed, or attempted to convey, by deed to James Thomas for a valuable consideration, a tract of land belonging to the wife. The grantee paid for the land, took possession and afterwards sold it. Through several intermediate deeds, it came to George Thomas by conveyance from Garner. George Thomas bought it in good faith and for a valuable consideration, and made valuable improvements thereon. He sold a portion to Beall, and the remainder to Pace. Beall also improved. In the meantime William Thomas having died, it was ascertained by his widow, that according to the clerk's certificate upon the original deed, she had not relinquished her fee, but only dower, in the land. Suit was brought by her against Beall and Pace, and a recovery of the land had.

Beall and Pace brought suit upon their covenants of warranty, against the representatives of George Thomas, their warrantor, and made Elizabeth Thomas a defendant; and the former claimed, in addition to the consideration money, the value of his improvements. The representatives of George Thomas answered, and in their answer claimed over against their co-defendant Elizabeth, the value of the improvements put upon the land by their ancestor George, whilst in possession. Upon their answer,

however, it does not appear that any process was issued, or served upon Elizabeth Thomas. She answered the petition of Beall, and submitted the question of her liability to the court, asking its protection, &c.

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A commissioner was appointed to ascertain what improvements were put upon the land by George Thomas, and what by Beall, their value, and what the land was enhanced in vendible value by reason of the improvements severally made by Thomas and Beall, and also the value of the rents from her husband's death to the same time.

Upon the return of the report, a judgment was rendered in favor of the executor of George Thomas, deceased, against Mrs. Elizabeth Thomas, for \$1,362 76, the reported enhancement of the vendible value of the land by reason of improvements put on it by George Thomas during his life; and the case as to Beall continued, to ascertain the value of rents for which he was chargeable.

Mrs. Thomas has appealed, and the question of the liability of a woman for improvements made upon her land in good faith by those who believed it theirs, and during her coverture, is, so far as we know, for the first time directly presented in this court.

The disability of coverture, under which she labored when the improvements were made, is the chief difficulty to be encountered in the solution of the question.

At common law the very being and existence of the wife was, in a legal sense, suspended during marriage, or at least incorporated and consolidated into that of the husband. The reasons upon which this principle was founded, were, not only the safety of the husband, in depriving her of the power to injure him by any act, without his concurrence or assent, express or implied, but her own security, in guarding against the husband's influence over her, by disabling her from disposing of her own property, except by those methods, and with the solemnities,

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which the law prescribes. (*Roper on Husband and Wife*, vol. 1, p. 2.) The benefits arising to the wife in consequence of this disability, are well illustrated in this case by the recovery of the land in question by the appellant, in consequence of the blunder of the clerk in failing to take a proper acknowledgment of the deed to James Thomas.

But although a *feme covert* is incapable of imposing a charge upon her property, or of disposing of it except in the mode and with the solemnities prescribed by law, it does not result that she is exempt, after the removal of the disability of coverture, from that principle of equity which secures to innocent and *bona fide* occupants of land the value of lasting improvements, made whilst in possession and believing it their own. The principle is alike applicable to all, and no discrimination is made, or ought to be, exempting any from its operation.

1. Land was purchased by the husband which was the inheritance of the wife, conveyed by a deed by husband and wife to J. T., who afterwards conveyed to B.; but the first deed was not so acknowledged as to pass the wife's right. It was sold to a sub-purchaser, and improved by him; after the death of the husband the wife sued for and recovered the lands which had been improved by the purchasers: Held, that for improvements by which the vendible value of the land was increased, the

In *Barlow vs. Bell*, 1 *Marsh.*, 246, the appellant had purchased the wife's land of the agent of the husband: after the death of the latter he was evicted by the wife, and sued her for his improvements made whilst in possession. It appeared, however, that he had full notice of the wife's rights when he purchased, and was apprised of the consequences if he did purchase, and relief was refused him in the court below, and here, on that ground. This court in that case say: "As the labor bestowed on the land is sunk in the land, and was not done at the appellee's request, it is plain that she cannot upon any *common law* proceeding be subjected to the appellant's claim for compensation. Nor have we been able to find any adjudged case, where the English courts of equity have, under such circumstances, decided upon the right to compensation. But regarding courts of equity in supplying the defects of the common law, as being governed by the principles of natural justice, in the absence of all precedent we should have no hesitation in relieving the possessor for improvements made upon

the land whilst he *bona fide* considered it his own. The possessor, by bestowing his money and labor in meliorating the land, advances its value, and consequently the rightful owner, unless liable to the claim of compensation, is so much gainer by the loss of the possessor, contrary to the maxim *nemo debet locupletari alienae jactura*."

"It is not enough," the court continues to say, "that the possessor shows himself to have meliorated the land, but his money and labor must be bestowed under an honest conviction of his being the rightful owner of the land. If he takes possession without title, and knowing the land to belong to another, he is himself guilty of a wrong, and his claim for compensation ought not to be sanctioned."

In *Bell's heirs vs. Barnett*, 2 J. J. Marshall, 516, the principle is laid down, broadly, that a person acquiring title to land, and entering it *bona fide*, supposing it to be his own, must be paid for his improvement. And the same general doctrine is recognized throughout the books.

George Thomas and his vendee, Beall, occupy in this case a position that entitles them to the favorable consideration of a court of equity. They were certainly *bona fide* purchasers for value, and the fact that the defective certificate of acknowledgment to the deed of 1824 was of record, should not, by construction, and for the purpose of cutting off their equity, be regarded as affecting them with notice of her right to the land. An immediate vendee might be thus affected, but not so with remote vendees paying full consideration for what they innocently, though erroneously, regarded an absolute estate in the land.

The appellee occupying, then, the attitude of a person acquiring land and entering upon it in good faith, we can perceive no valid reason why he should not be paid for his improvements, at least to the extent that he increased the vendible value of the land at the

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widow was in equity bound to account, deducting the value of the rents accruing from the death of the husband. (*Bell vs. Barlow*, 1 Marshall, 246.) The principle is laid down in *Bell vs. Barnett*, 2 J. J. Mar., 516, that one who acquires title to land, *bona fide*, and enters upon and improves it, supposing it to be his own, is entitled to compensation for improvements.---- The second purchaser in this case was not presumed to have known the defect in the certificate of acknowledgment.

2. The liability in such case is to be measured by the increase in the vendible value of the land when recovered, arising from improvements.

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3. Upon an answer by our defendant a gainst another, being made a cross petition against another defendant, process is necessary before decree.

time of the recovery. And we are of opinion, that to that amount Mrs. Thomas is liable.

It does not appear with certainty from the decree directing the assessment of the increase of the vendible value of the land by the improvements, at what time it was estimated. Whether when they were made, or when the recovery was had. The liability should be measured by the increase of the vendible value when recovered. The improvements were only valuable to the appellant then, and it was then she became liable. This should be determined by ascertaining the value of the land at that time, with, and without the improvements, and apportioning the difference in such values between Beall and Thomas' representatives, according to the respective value of their improvements at such time. Beall to be held liable for rents accruing since the death of appellant's husband up to the time of recovery, as directed by the circuit court.

In failing to point out with certainty, the period when the assessment of the increase of the vendible value of the land should be made, the decree is deemed erroneous. It is likewise erroneous, because no process was awarded or served upon the appellant, upon the answer of Thomas' representatives. This was requisite before the judgment in their favor against a co-defendant could have been rendered.

Wherefore, the judgment *is reversed*, and cause remanded, that the same be set aside, and the cause again referred to a commissioner, with directions to report as herein indicated, and for a judgment upon such report, and other necessary and equitable orders not inconsistent herewith.

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Montgomery, &c. vs. Firemen's Insurance Company.

Case 17.

APPEAL FROM LOUISVILLE CHANCERY COURT.

ORD. PET.

1. Contracts are to be construed according to the real intent and understanding of the parties, primarily by the words which they have used, with the aid, if necessary, of such other considerations as may show the sense in which the party intended to be understood.
2. When a stipulation in a policy of insurance is that the insurers are not to be liable for loss arising from the bursting of boilers, and the boiler burst, and the boat took fire and burned up: Held, that there was no liability under the policy.

The facts of the case are stated in the opinion of the Court. *Rep.*

B. Ballard for appellants—

Argued that the loss of the boat of the appellants was by fire, and though the fire originated from the bursting of the boiler of the boat, it was nevertheless a loss by fire, which is within the terms of the policy. *City Fire Insurance Company vs. Collier*, 21 *Wendell*, was a case of insurance against fire only. It was shown that the house was blown up by gunpowder by order of the mayor of the city, at the great fire in 1835, to arrest the progress of the fire. It was held that the company was liable—the insurance being against fire it was not material how it had its origin, if it was not by the fraud of the insured.

In the case of *Waters vs. Merchant's Insurance Co.*, the plaintiff's boat was, among other things, insured against a loss by fire; it appeared that a keg of powder on board the boat burst in consequence of the carelessness of some of the hands, set fire to the boat, and she was a total loss. The defendant relied, in defence, that the boat was lost by the negligence of the plaintiff's hands; which negligence was not insured against; but the insurance being against loss by fire the court held the company liable, and it

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was not material how it originated. The same doctrine was approved by this court in the case of *Powell vs. Firemen's Insurance Co.*, 13 B. Monroe, 311.

The case of *Lewis vs. Jamison*, 12 East., 648, is relied on as maintaining the principle that the immediate cause is to be looked to, and not the cause of the cause, as also *Rice vs. Horner*, 12 Massachusetts Reports, 230.

It is believed that no case can be found in which the insured has been denied indemnity when he established the loss as arising directly from one of the perils insured against, on any such ground that that peril was caused by another peril not insured against, or even by another peril which was excepted.

The risks insured against are all in one clause of the policy, in these words: "Of the rivers, fire, enemies, pirates, assailing thieves, &c." In a subsequent clause, but not the next succeeding, it is stipulated as follows: "It is agreed that this insurance company is not liable for any loss or damage which may arise from, or be occasioned by the said boat being unduly laden, nor for any loss arising from the explosion of gunpowder, the bursting of boilers, the collapsing of flues, or breaking of the engine, or any part thereof, except from unavoidable or external causes."

In this case the fire did not immediately succeed the explosion—it was some twenty minutes thereafter—but all the proof shows that it was caused by the explosion. Assuming that the fire was caused by the explosion, the defendant insists that he is not liable for the bursting of the boiler, nor for any of the consequences resulting from it, and that such is the effect of the exception in the policy on that point. What is the effect of the exception? Without the exception it is plain that the defendant would be liable for the damages done by the explosion, as well as by the fire. This follows from the fact that the explosion is one of "the perils of the rivers," and that the "perils of the rivers" are expressly insured

against. That the explosion of a boiler is a peril of the river is clear upon principle, and is settled by authority. (*Phillips on Insurance*, 592, 627; *Perrin's adm'r's vs. Protection Insurance Company*, 11 *Ohio Reports*, 147; *Citizens Insurance Company vs. Glasgow*, 9 *Missouri Reports*, 411.)

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The effect of making an exception of the bursting a boiler is to except it as one of the perils of the rivers. It is in effect saying, by the underwriters, though we have in the first part of the policy said we would insure against the perils of the rivers, yet we do not intend to assume the risk from bursting of boilers. This leaves the risk from fire, without the exceptions embraced by the terms of the policy; and they are bound for all risks resulting from fire, however it may have originated. A different construction would be to reverse the well established rules in the construction of policies. It would be to construe the general terms of the policy rigidly against the assured, and the exception liberally for the insurer; while on the contrary the policy is to be liberally construed to give indemnity to the assured—all exceptions are to be construed liberally against the insurer. Duer says "as a contract of indemnity to the assured, the policy is to be liberally construed in his favor, not only because this mode of construction is most conducive to the interest of commerce, but because, for the reasons that have been stated, it is most consonant to the intention of the parties. It is certain that the assured desires as ample an indemnity as he can obtain, and it is probable that the insurer means that he shall understand the indemnity given to be as extensive as its terms, upon any fair interpretation, import." "For the same reasons, and not in obedience to a mere technical rule, an exception from the risks of the policy is to be construed strictly against the insurer. Such an exception is a modification of the promise of indemnity, and all that promise is to be construed liberally. It is a necessary consequence that the exception cannot be

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permitted to abridge its operation to a greater extent than the terms used plainly require." (1 *Duer on Insurance*, 161, 2, sections 5 and 6; *Potter vs. The Ontario and Livingston Mutual Insurance Company*, 5 *Hill's New York Reports*, 14.)

In *Turney vs. Etherington*, quoted and adopted by Mansfield in *Pelly vs. Royal Ex. Ass. Co.*, 1 *Burrow*, 341, Lord Chief Justice Lee said: "It is certain that in construction of policies *stricture jus* or *apex juris* is not to be laid hold on, but they are to be construed largely, for the benefit of trade and for the assured." In *Dow vs. Whetton*, 1 *Hall's Supreme Court Reports*, 274, Chief Justice Jones said: "The policy is a contract of indemnity, and such construction is to be given to the words employed in it as will make the protection it affords co-extensive, if possible, with the risk it assumed." The same principle is recognized in the following cases: *Palmer vs. Warren Insurance Company*, 1 *Story's Report*, 360; *Blocket vs. Royal Ex. Assurance Co.*, 2 *Crough. & Jarvis*, 244; *Zeaton vs. Fry*, 5 *Cranch*, 335; *Louisville Fire and Marine Insurance Company vs. Bland & Coleman*, 9 *Dana*, 151. Such, it is believed, is the universal rule. In the case of *Zeaton vs. Fry*, *supra*, the court said, in substance, that the exception being in the words of the insurer, and introduced for his benefit, does not exempt him from liability except from risks necessarily embraced by it.

The exception does not extend farther than to save the insurers from the direct injuries resulting from the bursting of the boilers, and does not exonerate them from injuries resulting from fire, though the bursting of boilers may have caused the damage from fire; and it cannot be assumed that the assured understood that there was to be any exemption, in any case, from liability for an injury resulting from fire, from whatever source it might arise. The exception can have its full effect by confining it to the direct injury resulting from the bursting of boilers, and it certainly does not necessarily embrace any other risk,

and we rely that on the authority of the cases cited it can have no other meaning.

Fire and explosion are two distinct perils, and that is important to be borne in mind in considering the meaning of the exception. In *Millandon vs. New Orleans Insurance Company*, 4 *Louisiana Reports*, 15, referred to in *Angel on Fire Insurance*, the insurance was against fire only. The house insured was destroyed by the explosion of a steam boiler used in it. The court held that the insurers had not taken the risk against explosion, but only of fire, and as the loss was from explosion the insurers were not liable.

In *Babcock vs. Montgomery County Insurance Company*, 6 *Barbour's New York Reports*, 637, the building was insured against fire by lightning; the building was struck by lightning, and destroyed by its explosive power, but there was no fire: held that the insurer was not liable. Then if fire and explosion be distinct perils, it follows that an insurer may take one risk and not the other, or he may except one risk and not the other.

Only two cases have been found in the decisions of the courts of the United States, in which such an exception has been considered. In one case the action was founded on a fire policy, and in the other on a river policy, and in each case the decision is in accordance with the views here presented. In *St. John vs. The American Mutual Fire and Marine Insurance Company*, 1 *Duer's N. Y. Sup. C. Rep.*, 371, reported also in *Livingston's Law Reg. for 1854*, p. 429, by this policy the defendant agreed to indemnify the plaintiff against all such loss or damage as should happen by fire on the machinery and fixtures, and brick buildings Nos. 5 and 7. By one exception annexed to the policy, it was provided, "that the company will not be liable for any loss occasioned by the explosion of a steam boiler." The proof showed that a steam boiler exploded on the premises, producing fire which destroyed the subject of insurance. The court below refused to non-suit the plaintiff, and he had judg-

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ment. This decision was reversed by the superior court; but this court's attention is called to the particular grounds of that reversal. That court say: "All kinds of loss resulting from the explosion of a steam boiler, not producing fire, nor bringing the insured property and fire in contact, must necessarily have been borne by the plaintiff, even if no part of this clause had been contained in the policy. The insurance is only against loss and damage by fire. If there had been no fire, and the insured property had been utterly destroyed by the explosion, no recovery could have been had against the company, even if this clause had been omitted, for the simple reason that only loss or damage by fire was insured against. It cannot be supposed that the clause was introduced to guard against a liability which could not by any possibility arise, but to guard against one which might arise but for the existence of this provision. The only one which could arise from the explosion of the steam boiler, would be for an immediate loss or damage by fire occasioned or communicated by such explosion."

"The policy, after providing that the company will not be liable for any loss or damage by fire happening by means of any invasion, &c., adds that they will not be liable for any loss occasioned by the explosion of a steam boiler. The most comprehensive terms are here used, and if this loss was occasioned by the explosion, it would seem to be covered by the clause whether the loss resulted from the fire being directly communicated to the injured property, or from its being crushed into worthless fragments."—"A loss of the former nature was the only one which the company had any occasion to guard against; we think they have done this by the clause in question."

It is plainly to be inferred from this decision, that if the risk of explosion, as well as that of fire, had been covered by the policy, the court would have construed the exception as exempting the underwriters only from the loss by explosion, and have held

them liable for loss by fire ensuing the explosion.— In the policy in the case under consideration, the risk of explosion as well as fire is assured, and the exception is not only not nugatory if the insurer is held liable for the loss by fire, though the fire was caused by the explosion.

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In the case of *Citizens' Insurance Company vs. Glasgow*, 9 *Missouri R.*, 40, the risks were the same as in this case. The condition is in these words: "It is agreed that the assurers are not liable for any partial loss or particular average, unless such loss or average amounts to 10 per cent. on the value of the boat; nor shall they be held liable for the bursting of the boilers, or the breaking of the engines, unless occasioned by external violence." One of the boilers bursted, producing fire which destroyed the boat.— The court held the insurers liable.

It is insisted that although the insurer is not responsible for the loss arising directly from the bursting of a boiler, they are liable for the loss resulting from fire resulting as an effect of the explosion of the boiler. In support of this principle the following authorities are relied on: *Simpson vs. Charlestown Insurance Company*, *Dudley's Rep.*, 239; *Zeaton vs Fry*, 5 *Cranch*, 335; *Carrington vs. Merchts. Ins. Co.*, 8 *Peters*, 495.

It is only when the damage by each peril cannot be distinguished, that the whole loss is to be ascribed to the efficient peril, that is, the peril by which the other is directly occasioned. (1 *Phillips on Ins.*, sec. 1137, p. 675.) But if the damage by each peril can be distinguished (which can be done in this case,) the whole loss cannot be ascribed to one peril, though that peril put in operation the other peril.

Speed & Worthington for appellees—

This cause comes up now upon the following facts.

The steamboat *Oregon* being under Insurance, burst one of her boilers, and taking fire therefrom was totally lost. The proof shows incontestably that

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the fire arose instantly and necessarily from the explosion.

The perils which are covered by the policy are of the rivers and fires, and all other perils losses and misfortunes which shall come to the damage of the boat, *according to the true intent and meaning of this policy, as herein expressed.* In an after part of the policy, it is declared that the company shall not be liable for any loss or damage *arising from the bursting of any of the boilers.*

For the plaintiff it is contended that a recovery can be had for all the damage by fire; that the insurance is against fire, and the insurer must, under the contract, make good the loss, no matter how the fire originated.

The familiar rule that every instrument must be construed, not by looking at each particular sentence, or paragraph, or part, but at the whole instrument, is required upon the face of this contract, and the very sentence that affords indemnity to the plaintiff. Indemnity is contracted to be afforded, not "according to the true intent and meaning of this sentence," but of this "*policy.*" Does the contract intend to afford indemnity for any loss "arising from the bursting of the boilers"? Is not the language of the policy simply that a fire which is an inevitable consequence of an explosion is not covered herein, or does it not mean that?

What is the difference betwixt the modes of expression "arising from," "occasioned by," "and necessarily consequent upon"? For all practical purposes they are the same. The effect which arises from a given cause is necessarily consequent upon it, and that effect which is necessarily consequent from a cause arises from it. If other than one cause may intervene to produce an effect, then the effect cannot be said to arise from, nor to be consequent upon, either cause.

All damages are more or less consequential. If a hole that could be repaired for one hundred dollars,

is knocked in a boat, and she sinks therefrom, the insurer is liable. Why liable? Because the loss is a direct consequence, or arises from the injury. Why is not the same rule applied to the exceptions in the contract? If an insurer is liable for all the immediate consequences of a peril insured against, he should have the benefit of all the immediate consequences of an excepted peril. Mr. Phillips says that underwriters are not liable for the direct consequences of an excepted risk. (2d vol., page 478, sec. 1793.) It seems to me to be a rule of such plain equity that it needs no citation of authority to establish it.

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Suppose this case reversed; that an explosion had been an immediate and necessary consequence of a fire. The whole loss would have been recoverable, because explosion in such case would be an effect, and not the less an effect because it contributed to increase the loss. An effect may become a cause of further disaster, but it does not therefore cease to be an effect.

That is the immediate cause of loss to which all the effects can be *certainly* traced.

On the other hand, that can never be said to be the immediate cause of the loss, when other and independent causes may have intervened, either to originate or increase the loss.

Atwood on the same side—

Argued: 1. The boat was lost by the bursting of a boiler causing fire. The insurers are not liable, but are exempted from liability by the express terms of the policy. The terms of the policy are comprehensive. The company "is not liable for any loss arising from the bursting of the boilers." An explosion may occasion a partial, or it may, and frequently does, occasion a total loss; but for a loss either partial or total, or *any* loss, in the language of the policy, arising from the explosion of the boilers, the underwriters are not liable. The loss being the result of the explosion, is within the exception in the policy.—

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Phillips says some insurers take the risk of fire in such cases—(3d ed. *Phillips on Ins.*, p. 41, sec. 60, note)—that is, that some insurers, while they expressly except losses from explosion, expressly bind themselves to pay a loss by fire in such case. This shows that when the exception remains in full force, as in this policy, the assured, and not the underwriters, take the risk resulting from the explosion of the boilers.

The doctrine is that the underwriters are liable for the direct effect of the perils insured against, while the assured bears the direct effect of those excepted. (*Phillips on Ins.*, 3d ed., p. 667, sec. 1151.) In this case the fire was the direct cause of the loss.

Again: "In case of the concurrence of different perils, to one of which it is necessary to attribute the loss, it is to be attributed to the efficient, predominating peril, whether it is or is not in activity at the consummation of the disaster. (*Phillips on Ins.*, 3d ed., 671, sec. 1132.) In this case the explosion was not in activity at the time of the burning, but the explosion caused the fire, and therefore was the efficient cause of the loss. (*Phillips on Ins.*, 3d ed., 672, sec. 1134; *ib.*, 675, sec. 1137.) The assured having taken the risk of explosion, takes the risk of all the consequences of explosion. (*Peters vs. Warren Ins. Co.*, 14 *Pet.*, 99; *Magoun vs. New Eng. Ins. Co.*, 1 *Story*, 158; *Savage vs. Pleasants*, 5 *Binney*, 103; *American Ins. Co. vs. Dunham*, 12 *Wendell*, 463.) Judge Story lays down the rule that all the consequences naturally flowing from, or incident to, a particular peril, are attributable to the peril itself. The same doctrine is maintained in *Waters vs. Merch'ts Ins. Co.*, 11 *Peters*; *Perrin vs. Protection Ins. Co.*, 11 *Ohio*, 147; *Coit vs. Smith*, 3 *Johnson's N. Y. cases*, 16.

2. It is contended that in the body of this contract, and its obligatory clause, there is an exception to the liability of the company which narrowed the responsibility, and for such loss the defendants were not responsible. In such cases the plaintiff must show that

the case is not within the exception. (3d ed. *Gould's Pleadings*, chap. 4, sec. 20; 9th Amer. from 6th London ed., *Chitty's Pleading*, 309; *Ib.*, ed. of 1828, 317.) If certain risks are excepted the loss must appear to have been caused by those not excepted. (2d ed. *Arnould on Ins.*, 2d vol., 1262. 3d ed. *Phillips on Ins.*, 2d vol., sec. 2025; *Daglish vs. Brook*, 15 East., 295; *Hahn vs. Corbet*, 2 Bingham, 315; *Latham vs. Rutley*, 2 Barn. & Cress., 20.) The causes of the loss must be truly stated. (*Phillips on Ins.*, 2d vol., sec. 2022, page 616; 2d ed. *Arnould on Ins.*, 2d vol., 1273.) And must be proved if denied. (2 *Phillips on Ins.*, sec. 2046.) And the proof must bring the case within the terms of the contract. (*Merchants' Ins. Co. vs. Wilson*, 2 Mad., 217, cited 13th vol. *U. S. Dig.*, 420.)

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The cases of *Roe vs. Columbus Ins. Co.*, 17 *Missouri Rep.*, (2 Bennet,) 301; *McCallister vs. Tennessee Marine and Fire Insurance Co.*, 17 *Missouri Reports*, 306, are strictly analogous to the case before the court. The policies are almost identical in their provisions.

Chief Justice MARSHALL delivered the opinion of the Court.

December 19.

On the 14th day of November, 1849, the Firemen's Insurance Company of Louisville executed a policy insuring J. E. Montgomery, or whom it may concern, in the sum of \$5,000 on the steamboat Oregon, for twelve months from that day. The insurance was afterwards, by endorsement on the policy, extended for twelve months from the 14th day of November, 1850, and on the 2d day of March, 1851, while the Oregon was under full headway descending the Mississippi river, one of her boilers bursted, by which the furnace or fire-bed was uncovered, the neighboring timbers and woodwork broken and shattered, and brought in contact with the fire, which soon after spread through the boat, and in a short time it was burnt to the water's edge. In October, 1853, Montgomery and Dean, as owners of the boat at the time of the disaster, brought this action, upon

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the policy, to recover for the loss, and the question is whether the insurers are liable for it. This question depends upon a comparison of two clauses in the policy and upon the cause of the loss.

The clause describing the perils or risks undertaken by the insurers, states that they are of rivers, fire, enemies, pirates, assailing thieves, &c. And after the usual clause authorizing the insured, in case of loss or misfortune, to labor, travel, &c., for the defense, recovery, &c., of the boat, follows a clause by which "it is agreed that this insurance company is not liable for any loss or damage which may arise from, or be occasioned by, the said boat being unduly laden, nor for any loss arising from the explosion of gunpowder, the bursting of the boilers, the collapsing of the flues, or breaking of the engine, or any part thereof, except from unavoidable external cause or causes."

We think there is no room for reasonable doubt on the evidence that the fire which actually destroyed the boat was caused directly and immediately by the bursting of the boiler. But some of the witnesses attempt to estimate the damage which was or would have been done by the mere force of the explosion, if there had been no burning; and it is contended on the part of the plaintiffs, that although under the clause of the policy just quoted, the defendant is exempt from the loss produced by the mere explosion, the clause cannot be construed to embrace a loss by fire, although the fire itself be attributable solely and certainly to the bursting of a boiler. The argument is that loss by fire being expressly, and loss by bursting of boilers impliedly, included among the perils insured against, and the insurer being by the succeeding clause exempt from liability for loss by bursting of boilers only, the liability for loss by fire remains, whatever may have been the cause of the fire, because the insurance against loss by fire is not restricted by any reference to the cause which may produce it; that the clause containing the exemption

is an exception of hazards or losses of a particular description from the general undertaking of the insurer, which must have been understood as including them, and that as the description of the perils insured against, should be liberally construed to effectuate the expected indemnity, the same reason requires that the exception inserted by the insurer for his own benefit, should be construed strictly, and forbids the exemption of the insurer from his express undertaking, without the express exception of a loss within that undertaking.

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The principle of construction here appealed to is just and reasonable, but it must operate in subordination to the still higher and more universal principle, that contracts are to be construed according to the real intent and understanding of the parties, to be ascertained primarily by the words which they have used, with the aid, if necessary, of such other considerations as may show the sense in which they were used, or in which the party using them must have supposed them to have been received. What, however, then, might under the principles of construction appealed to by the plaintiffs, have been the case if the exempting clause had been that the company "is not liable for bursting of boilers," or even "for loss by bursting of boilers," we think the terms actually used plainly and necessarily extend the exemption beyond the injury occasioned by the mere force of the explosion, either to the boiler itself or to the machinery connected with it, or to the adjacent parts of the boat, and include any loss which, in view of the actual facts, can be properly said to arise from the bursting of the boiler. There seems to be no room for construction, liberal or strict, except in regard to the words "arising from," which designate the connection or relation between the bursting of boilers and the losses for which the insurer is not to be liable. In the law of insurance these words are understood to refer to a proximate, and not a remote connection between the loss and its cause. *Causa*

1. Contracts are to be construed according to the real intent and understanding of the parties, primarily by the words which they have used, with the aid, if necessary, of such other considerations as may show the sense in which the party intended to be understood.

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proxima non remota spectatur, is a maxim in that law which, although differently construed at different periods, has in terms been adhered to from time immemorial.

In the application of this maxim, many of the older cases determined that the loss must be attributed to the cause of injury or destruction actually in operation at the time of its occurrence, and it was consequently held that, although a peril insured against had in fact subjected the vessel to the cause which destroyed or injured it, or although a peril assumed put in operation the destructive cause, the loss was to be attributed to the cause immediately operating at the time of its occurrence. But the modern decisions still adhering to the same maxim, but under a broader construction, have established the more reasonable doctrine, that if the vessel is by a peril insured against subjected to the operative cause of destruction or injury, or if the peril insured against puts the destructive cause in operation, the peril insured against being in fact the real cause of the loss, is to be deemed the proximate cause, and especially when the destructive cause is in operation before the vessel is relieved from the peril insured against.

If this policy had insured the Oregon expressly against any loss arising from the bursting of boilers, and against no other peril whatever, there would have been no doubt that the loss which actually occurred through the immediate effect of fire, and not of the explosive force which bursted the boiler, would have been attributed to the bursting of the boiler as the efficient and sufficiently approximate cause of the loss; and that the loss through fire was the immediate means of producing it, would have been regarded as the proximate consequence of that cause which immediately produced the fire by which the boat was destroyed. Nor can it be doubted, as we suppose, that if the plaintiffs, in consequence of the exempting clause in this policy, had procured from another insurer, a policy insuring the Oregon against any loss arising from the bursting of boilers,

the last insurer would have been held to be exclusively liable for the loss which actually occurred, and would have had no right either to apportionment or contribution; nor do we suppose that in the last case the plaintiffs could at their own option throw any part of the loss upon the underwriter of the policy now before us.

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Are these results sufficiently accounted for by saying that the liberal construction by which, in the first case, the policy would be understood to cover the loss, is in the last case repelled from the general clause, or applied also to the exempting clause of this policy, in consequence of the conduct of the insured, from which it would be clear that he did not understand this policy, taken altogether, as insuring against any loss arising from the bursting of boilers? We are not aware of any general principle which allows the understanding of one of the parties to determine the meaning of the contract between them. It is a rule sometimes applied in cases of ambiguity, that words are to be construed most strongly against the party using them; and it is a rule founded upon the same principle of honesty and good faith, that when a promise or stipulation is susceptible of two meanings, it should be construed and effectuated in that sense in which the party making it knew, or had reason to believe, it was understood and received by the other party. But these and all other rules of construction are resorted to for the single and just purpose of ascertaining and carrying into effect the real intention of both parties, to be arrived at by a fair interpretation of their language under such lights as may be furnished by the context, and by all the circumstances which it indicates. And when the common signification of the language used by ordinary men is plain, and may be regarded as certain in its import as understood by ordinary minds, unless in the sense thus indicated the provision or stipulation be absurd, or evidently unjust or unreasonable, there is more danger of perverting than of effectuating

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the real intention of the parties, by resorting to refined and artificial construction for the purpose of giving to their language a meaning and effect different from its plain and natural import.

2. Where a stipulation in a policy of insurance is that the insurers are not to be liable for loss arising from the bursting of boilers, and the boiler burst, and the boat took fire and burned up: Held, that there was no liability under the policy.

We think that when it is plainly said in the negative clause, that the company is not liable for any loss arising from the bursting of boilers, the insured must have understood this language according to its obvious meaning, and could not have expected the company to be liable for any loss arising from the bursting of boilers; and that although the burning of the boat, or any injury by fire, does not always, nor often, attend the bursting of its boilers, yet as he must have known that it did sometimes, or at least that it might sometimes be the necessary and inevitable consequence of that cause, and as he must have understood that a loss so happening would be a loss arising from the bursting of boilers, he could not have expected the company to be liable for such loss, when it was expressly agreed that they were not liable for any loss arising from the bursting of boilers. Even if the policy had expressly insured against the bursting of boilers as well as against fire, it would not have occurred to an ordinary mind that the comprehensive declaration that the company is not liable for any loss arising from the bursting of boilers, should be restricted to the immediate effects of the explosive force of the steam, and would not embrace a loss by fire, although it should be in fact the necessary and immediate consequence and attendant of the actual explosion. As the company did not in terms assume the peril of any loss arising from the bursting of boilers, there is no reason on the face of the policy why the declaration of non-liability for any such loss, if regarded as an exception to a liability which would otherwise exist, should not be understood as an exception to the liability for a loss by fire necessarily and immediately caused by the bursting of boilers. The parties may not have known that under the general terms of this policy there was any

liability for the mere bursting of boilers, unless it set in operation, or was the consequence of, one of the perils expressly assumed or well understood to be included in the perils enumerated, and the declaration of non-liability may have been expressly intended to except losses by fire or other peril expressly insured against, but arising in fact and immediately or necessarily from the bursting of boilers. Or the declaration may have been inserted in the policy to make that certain which the parties, or the insurer, might have considered as uncertain; and as it does, in terms plain and unambiguous, clearly embrace the loss which has occurred, and as the destruction of the boat was the certain and natural consequence of the bursting of the boiler, and was a loss arising from it by the agency of fire communicated by the explosion itself, and simultaneous with it, we are of opinion that the peril of such loss was expressly, and as must be supposed, knowingly, assumed by the insured. This conclusion, drawn from the instrument itself, and from general considerations applicable to it, may derive some corroboration from the infrequency of the burning of boats by the bursting of boilers, which may account for the willingness of the owner to assume that risk, while the general uncertainty as to the causes of the explosion of boilers, and as to the extent of its consequences in particular cases, may account for the refusal of the insurer to be liable for any loss arising from that cause.

Wherefore, the judgment is affirmed.

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Case 18.

Bracken vs. Steamboat Gulnare.

PET. EQ.

APPEAL FROM LOUISVILLE CHANCERY COURT.

1. The owner of a slave domiciled in the state of Missouri, and having his slave there, cannot maintain a suit against a steamboat for the value of a slave escaping on such boat, on the ground that the boat passed through waters of Kentucky with the slave on board, under the statute of Kentucky. (*Revised Statutes*, 143, 4.)
2. To render the boat liable under the statute the slave must be conveyed, or attempted to be conveyed, out of this state, or from one part of the state to another, and this when the slave is taken on board of a vessel in this state, or at any place out of the state.
3. The statute was not intended to embrace slaves who were in no way subject to our laws at the time of their escape.

The facts of the case are stated in the opinion of the court. *Rep.*

Monroe & Logan for appellant—

The Court of Appeals, in the case of *Edwards vs. Vail*, 3 *J. J. Marshall*, 595, decided, under the statute of 1824, that the steamboat was not liable for removing the slaves "out of the limits of this state." The language of that statute is quoted in the opening paragraph of the opinion, and the cause decided upon the fact that the slave was taken on board the boat at Jeffersonville.

Upon first reading this case, and the case of *Church vs. Chambers*, 3 *Dana*, we concluded that the first named case was decided before the statute of 1828 was passed, but find no reference to that statute in the case. We do not know why it is, how it was, that the statute of 1828 was overlooked or ignored.

In the case of *Church vs. Chambers*, 3 *Dana*, 274, decided in 1835, the court refer to both statutes, and in virtue of the language of that statute decide that a slave taken on board from the Indiana shore is taken in violation of the statute, and the owners or officers of the boat are liable.

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The language of that act, to which reference is made, and under which the liability is fixed, is as follows: "The liabilities under said act, (the act of '1824,) shall occur wherever the person of color shall 'be taken on board any steam vessel from the shores 'of the Ohio river *opposite to this state*, and the like liability shall occur for landing, or suffering them to 'go on shore, within as without this state."

It will be seen that this statute is an advance in favor of slave owners, and an improvement upon the statute of 1824, and the decision in *3d Dana* an advance in the same way, and an improvement upon the decision in *3d J. J. Marshall*.

It will be contended, no doubt, that this cause turned upon the question of *jurisdiction* of Kentucky over the *Ohio river*. But upon close examination of the case it will be found that it was not. The court says, (*page 279*;) "Now although the local laws of Kentucky cannot, *proprio vigore*, operate *extra territoriam*, except so far as they may bind the citizens of Kentucky, as citizens, wherever they may be, nevertheless they may operate on all persons, on so much of the Ohio river as is within the jurisdictional limits of Kentucky, if they are consistent with the guarantee of free and common navigation and commerce. * * * * "And, therefore, Kentucky had a right to declare that the abduction of slaves, or the *deportation or transportation* of them *in vessels on the Ohio river, within her jurisdiction*, without consent of owners, and to their damage, should be unlawful. * * * * "Nor do the statutes of 1824 and 1828 interfere with the rightful power of the federal government to regulate commerce and navigation among the several states."

It might be presumed that the court in that case placed some stress upon the fact that the *contract* to take the slaves *was made* in Kentucky. But the liability was not fixed from that fact, but from the fact that Kentucky had a right to enact and enforce the statute. On page 278 the *second* proposition decides,

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"the Ohio river, as far as it is the boundary of this state, is within its jurisdiction. The eleventh article of the compact with Virginia, only guarantees to the citizens of *all* the states 'free and common use and navigation of the river.' "

The liability then was not fixed upon the owners of the boat because of the jurisdiction of Kentucky over the river.

The jurisdiction of Kentucky over the Ohio river was not the basis of the decision, because the slaves did not get on the boat from the water, but the presumption is inevitable that they stepped from *the Indiana shore* to the boat. In that case the owners were held liable.

But our *Revised Statutes*, page 143, section 3, goes still further, and advances and improves upon the statute of 1828, and provides that the owner of slaves shall recover for "conveying or attempting to convey the slave thereon out of the state, or *from one part of the state to another.*" * * * * "This section shall also apply where the slave is taken on board the *boat or vessel at any place out of this state.*"

The plaintiff's right to recover for the loss of his slave does not depend upon the question whether he *was taken on board* within this state; was he conveyed "from one part of the state to another," in the language of the statute? The verdict of the jury decides that he was, and the *statute* decides that in such case the boat is liable. It is not material whether the slave was put on shore *within or without this state*; whenever he once got *within* the state the liability was incurred. The boat was near Kentucky when he was taken aboard. She was in Kentucky in a few minutes. The jury find that she "*passed through the Kentucky waters with said slave.*" Was he not conveyed from one part of the state to another? I do not care, for the purposes of the present argument, whether Kentucky can give to citizens of other states the right to attach here, a boat found here, for a slave who had never been here, or not. It may she could.

But my present intention is to show that the slave *was on the boat in Kentucky, is lost*, was conveyed "from one part of the state to another" through Kentucky waters, and out of Kentucky to Cincinnati.

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If the boy had been *seen upon the boat* at Louisville, would not the plaintiffs, under the statute, have had a right to attach, if it appeared that he made his escape from them, whether he made his escape on that boat or not? Most certainly they would. Then as we prove the boy was on the boat within a few miles of Kentucky, going to Kentucky, and the jury find that he *passed through* Kentucky waters, on the boat, it devolves upon the defendants to show that *he was not* on the boat when she reached Kentucky's jurisdiction; otherwise the presumption is he remained upon her to her journey's end. If he had been seen on the boat, within Kentucky jurisdiction, the liability would be beyond question. We prove he was on, and the jury find he was on, and whether *got on* within Kentucky jurisdiction, or was only "conveyed from one part to another" of the state, the boat is as clearly liable as if he had stepped on board at Louisville.

The portion of the opinion quoted from *3d Dana*, page 279, does not confine the jurisdiction of the courts to the *place where* the slaves got aboard. It is nowhere intimated that if the slaves had got aboard at any point not on the Ohio river, that the boat would not be liable. But, as if intending to decide that the mere passing through her rivers would make the boat liable, they say: "Kentucky had a right to declare that the abduction of slaves, or the *deportation or transportation of them in vessels on the Ohio river*, within her jurisdiction, without the consent of the owners, and to their damage, should be unlawful." There is a marked difference in the language here used, and the mere naked idea that the *embarkation from the state of Kentucky*, is alone to fix the liability.

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The language of the Revised Statutes means something. If it does not apply to this case, then it means nothing. "This section shall apply where the slave is taken on board the boat or vessel at *any place out of this state.*"

If it is decided that it does not apply to this case, we know of no state of case to which it would be applicable.

Would the right of appellant depend upon catching the slave on the boat? Certainly not. To prove him on is enough, and defendant must prove him off. The jury find he passed through Kentucky to Cincinnati, and the law presumes he remained on board. Then the liability of the boat is clear. She was caught and attached in Kentucky. To say that plaintiffs were citizens of Missouri, and were therefore not protected by the statute, is not only ridiculous, but an argument against the constitution securing the same right to citizens of the several states.

A reversal is confidently asked.

C. W. Logan for appellee—

This is a suit exclusively *in rem* against the steamer Gulnare, for the purpose of subjecting it *specifically* to an alleged *statutory* liability for conveying a slave *out of the state* into parts unknown. The petition is not a proceeding against any *person* for a *personal common law liability*; and if it were, it does not contain facts sufficient to make out a *common law liability*. No person is made by plaintiffs a party defendant to the suit. The petition is framed upon the language of *section 3d, chapter 7th, of the Revised Statutes*. Under that section, (which applies, as we contend, to the Kentucky slaves alone,) the face of the petition is good. And if the facts alleged were sustained by the proof, the steamer Gulnare would be *specifically* liable to plaintiffs' demand. But the statements of the petition are controverted by an owner of the boat, who has filed an answer herein; and those statements are not sustained by the testimony

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or special verdict. The radical averment contained in the petition is that the boat *Gulnare* conveyed *out of the state (of Kentucky)* the slave *Ambrose*, but the testimony and the special verdict show that the plaintiffs resided at *New Madrid, Missouri*, and that the slave left his owners at *New Madrid*, and escaped upon the steamer *Gulnare*, a boat lying at the wharf of *New Madrid*, and bound to Cincinnati on her trip from New Orleans to said city, and that said boat passed through the waters of Kentucky with said slave. It is true that the verdict seems to assume that the petition charged that the slave *Ambrose* left his owners at *New Madrid, &c.*, but the petition charges no such thing. The charge of the petition is in the language of the Kentucky statute, and that charge is not sustained by the special verdict, so that if the suit had been brought in a *common law court* against the person for a *common law liability*, the case stated on the face of the petition would, in the first place, not be a *legal* cause of action, and in the second place, if it were it would not be sustained by the proof. On such a petition a recovery for a common law liability could not be had under such proof. If the suit had been brought against the person it would be necessary to aver *knowledge* or *consent* in the defendant, as well as a want of it in the plaintiffs—a tort would have to be shown by the averment of *negligence* or *otherwise*; and it would have been necessary to state that the slave was taken on board in *Missouri*, according to the fact, &c. If this had been done the testimony taken by defendant, showing that the plaintiffs in *Missouri* gave a general and standing verbal permission and authority to the slave to go where he pleased out of that state, would have defeated the action. (See on this point the depositions for defendant.) A general verbal authority to the slave to go where he pleased might very well be sufficient in *Missouri* to protect the owners and masters of steamboats from liability, even when they had actual knowledge of the slave being on the boat, whilst it

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might be necessary in Kentucky that the permission should be *in writing*; hence the importance of stating in the petition the *state or place from* which the escape is made. In this case the testimony does not show that the slave Ambrose was conveyed through the waters of Kentucky to Cincinnati, but we will suppose the fact to be as found by the special verdict, namely, that the slave literally did escape from *New Madrid, Missouri, through the waters of Kentucky*—that is, up the Ohio river—to Cincinnati. This fact, we insist, does not support the petition, *nor come within the statute of Kentucky*. The statute does not mean to give a remedy *in rem*, except where the slave is conveyed *out of the state of Kentucky*, or from the state of Kentucky. Passing through the state of Kentucky *from another state* does not create a lien, under a Kentucky statute, to protect the slave property of *another state*; the statute of Kentucky was designed to protect the slave property of Kentucky, and was addressed to the people of Kentucky. In terms it does not embrace the slaves of other states. There is no presumption that it was passed to operate extra-territorially. The presumption is that it was intended to operate only within the limits of Kentucky. The laws of states have force only within their own limits, and are never enforced elsewhere except by comity. If the state of *Missouri* gave a lien, for the escape of Ambrose, against the steamer Gulnare, comity might require it to be enforced; but comity does not require our courts to construe that the *Kentucky* statute was enacted to guard the slave property of *Missouri*. The section 264, article 3, of the *Code of Practice*, relates to this remedy for "the removal of a slave." Does not this section of the Code apply to a "removal" from our own state? Has it any reference whatever to another state? It cannot be made to embrace the removal of a slave *through Kentucky from another state*.

Section 3 of the *Revised Statutes* was taken from the acts of 1824 and 1828. The very title of the act of

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1824 indicates that it does not apply to the slave property of other states. It is entitled "An act to prevent the masters of vessels, &c., from removing persons of color *from this state*." The act of 1828 was simply an amendment of the act of 1824, and enlarges the liabilities of masters, &c., so as to include cases where the persons of color (spoken of in the previous act,) "are taken on board of any steam vessel from the shores of the Ohio river, *opposite to this state*, to the same extent as if taken on board from the shores or rivers within this state." This amendment plainly and exclusively applies to Kentucky slaves, and makes it immaterial whether (when conveyed out of the state,) they are received on board *within* the state, or *from* the shores of the Ohio river *opposite to the state*. The amendment was, doubtless, passed on account of the construction given by the Court of Appeals to the act of 1824, in the case of *Edwards vs. Vail*, 3 J. J. Marshall, 596. That case had decided that the act of 1824 did not apply even to Kentucky slaves when they were taken on board of a boat *on the opposite side of the Ohio river*. The amendment of 1828 protects Kentucky slaves even though they be taken on board from the shores of the Ohio river *opposite to this state*. The 3d section of chapter 7 of the Revised Statutes, takes but one step beyond the acts of 1824 and 1828, and that is, it gives a remedy for conveying a slave out of *this state* even "when the slave is taken on board of the boat or vessel at *any place out of this state*." It is obvious, from the language of this section, taken in connection with former statutes, and the decision reported in 3 J. J. Marshall, that it relates exclusively to Kentucky slaves taken from Kentucky. It is hardly reasonable to suppose that the Legislature of Kentucky meant to pass an act for the purpose of protecting the slave property of *other* states. The act of 1828 amended the act of 1824 only with a view to afford a larger protection of *Kentucky* slave property than already existed. Surely that amendment did not

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originate from a desire to help the other slave states of the Union. Had such been its object we should have seen that the help was reciprocal.

Consent *in writing*, under the Revised Statutes, will relieve the steamboat from liability. If the slave of another state is taken on board, say at New Madrid, Missouri, where a writing may not be required, and is conveyed *through* Kentucky, on the Ohio river, how can it be expected that when the boat is *in its transit* through Kentucky, the master of the slave can *here* give his consent in writing. The Kentucky law does not attach in such a case. It cannot attach except when the slave starts *from* Kentucky; then the written consent might be given, but it could not be given whilst the boat, with steam up, is on the waves of the Ohio. The Kentucky statute was not passed for such a case. In the decision before referred to the Court of Appeals say, "Looking to the mischief which the legislature must have contemplated, and confining the operation of the act to them, we must except from the operation of the statute the cases where colored persons are taken on board in other states and pass out of the limits of this state in *their transit over our territory*." This decision seems conclusive of this case without anything farther.

December 24.

Judge CRENSHAW delivered the opinion of the Court.

This is a proceeding by attachment against the steamer Gulnare, instituted in the Louisville chancery court, under the provisions of the Revised Statutes, 143-4, to obtain satisfaction for the value of a slave named Ambrose, who escaped upon her from New Madrid, Missouri, in April, 1855. A jury was impanelled in the case, who found the following facts, which are, substantially, the facts proved in the cause:

1. That the plaintiff resides in New Madrid, Missouri.
2. That the slave, Ambrose, left his owner at New Madrid, as charged, without the knowledge or con-

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sent of the owner, and escaped upon said steamer, then lying at the wharf of New Madrid, and bound for Cincinnati on her trip from New Orleans to said city, and that the boat passed through the waters of Kentucky with said slave.

3. That the value of the slave was \$1,000, and that the plaintiff had expended \$100 in his efforts to recover him. The chancellor dismissed the petition, and the plaintiff has appealed to this court.

The third section of the law above referred to, reads as follows: "A steamboat, or any other boat or vessel, shall also be liable to indemnify the owner of any slave for any damage he may sustain by reason of the conveying, or attempting to convey, the slave thereon out of the state, or from one part of the state to another, without the consent, in writing, of the owner of the slave, or unless the owner, or person having the rightful control of the slave, be also a passenger on the boat or vessel. This section shall also apply, when the slave is taken on board of the boat or vessel at any place out of this state." The fifth section gives a lien upon the boat in such case, and authorizes the proceeding adopted in this suit.

The only question deemed important to decide is, whether the plaintiff, he and his slave being domiciled in the state of Missouri at the time of the slave's escape, can maintain this suit, simply because the boat passed through the waters of Kentucky with the slave. We think he cannot.

This suit is against the boat by attachment, by virtue of the foregoing provisions of the Revised Statutes, and not a suit against the owners, captain, or any of the crew, for the recovery of damages *in personam* for the injury done to the plaintiff in taking and carrying away his slave. No person is made defendant, but the suit is simply *in rem*—against the boat.

It was, doubtless, the primary object of the legislature, in the enactment of the law above adverted to, to protect the slave owners of our own State. Still,

1. The owner of a slave domiciled in the state of Missouri, and having his slave there, cannot maintain a suit against a steamboat for the value of a slave escaping on such boat, on the ground that the boat passed through the waters of Kentucky with the slave on board, under the statute of Kentucky. *Revised Stat., p. 143-4.*)

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the legislature should be regarded as having intended to protect the owners of slaves, sojourning with them in this state, though not residents thereof, and also as having intended to protect the owners of slaves who might reside in another State, and whose slaves might, at the time of their escape, be permanently or temporarily within our state; and the law should be construed to embrace such states of case. But we do not believe that the legislature intended to afford the remedy of the enactment to the citizens of another state, whose slaves do not escape from this state, but from a state in which both the owner and slaves reside, and in which they are at the time of escape, simply because the slaves, after escape, may pass in a boat up the Ohio river, over which this state has jurisdiction.

2. To render the boat liable under the statute the slave must be conveyed, or attempted to be conveyed out of this state, or from one part of the state to another; and this, when the slave is taken on board of a vessel in this state, or at any place out of the state.

According to said third section, the slave, escaping, must be conveyed, or attempted to be conveyed, out of this State, or from one part of the state to another, &c., and this not only when the slave is taken on board of a vessel in this state, but at any place out of the state. The town of Weston, Missouri, is a place out of this state. Suppose a slave escapes from his owner in Weston, Missouri, where they both reside, on board a steamboat, destined from that port to Cincinnati, is it reasonable to construe our statute as applying to such a case, because the boat passes up the Ohio river with the slave, and, therefore, may be said in a certain sense to convey the slave from one part of the state to another? Certainly not.—Our law was not intended to meet and provide for such a case. And the state of case presented in this controversy is precisely similar. If the owner and his slave be domiciled in this state, or be temporarily sojourning here, or the slave alone, have, at the time of his escape, his abode here permanently or temporarily, it matters not at what place he may be taken on board the boat upon which he escapes, provided he be taken out of the state, or from one point to another in the State; and, in such case, the pass-

ing of the vessel with a slave up, or down, the river, to another point in, or out of this state, ought to be regarded as carrying the slave out of the state, or from one point to another in the state, as the case might be, and so be embraced by the statute. But such was not the case in the present controversy.

Had it been shown in this case that the slave had ever been landed upon our shores, and again taken on board and conducted off, it would seem that the statute might apply, and the boat be subjected for his escape. It might not appear to be unreasonable to construe the statute to embrace such a state of case. But whether the statute would, or not, embrace such a case, we do not decide, because it is not necessary. We have no doubt, however, that the legislature did not intend the statute to operate in reference to slaves who, at the time of escape, are in no way subject to our laws, and do not become so, except by simply passing in a boat up, or down the Ohio river.

Wherefore, the judgment is affirmed.

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3. The statute was not intended to embrace slaves who were in no way subject to our laws at the time of their escape.

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Case 19.

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1. The husband made a deed to a trustee for the benefit of his wife, and afterwards made his will, the provisions of which were renounced by the widow: Held that as there was no provision in the deed showing that the wife was to have no more of the estate of her husband than as provided for her by the deed, that she could renounce the provisions of the will, and claim, in addition to the property deeded to her trustee, her distributive share of the estate—there being no issue of the marriage, is one-half.
2. An executor is bound to pay to distributees a debt which he owed the testator; and is not entitled to any commission for distributing that fund.

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The facts of the case are fully stated in the opinion of the court.—*Rep.*

James Speed and *W. S. Bodley* for appellee—

The main question presented for the decision of the court in this case is, whether Mrs. Worsley has the right to hold the property conveyed in trust for her benefit, renounce the provisions of the will of her husband and claim her distributive share of his estate.

As the law allowing a widow to renounce the provisions of her husband's will (in a case like this,) was intended to secure to her one-half the husband's estate, it was not intended to give her the right to take the one-half given, with the view to provide for her as a widow, and also one-half the remainder against the husband's will. In a case where the first gift was made by him as the means of securing his wife at least one-half to which she was entitled, and in case he left a will, so much more as he might desire to give her.

The deed of 1846 expressly secures to Mrs. Worsley a provision for her *as widow*. It expressly refers to the death of Mr. Worsley, and is designed to secure to Mrs. Worsley a part of what she was entitled to have as his widow.

It is said Mr. Worsley may have intended to give his wife more than he gave by the deed. Evidently he did so intend. This may be inferred from the recital of the deed, and it is manifested by the fact that he did by his will give her the whole income from the residue of his estate during her life. She is not satisfied, but claims such farther benefit as she supposes the law will give her. This is what the husband meant to guard against by the language of the deed. Whether the recitals be regarded as operating by way of election, condition, or covenant, the intention is manifest that the widow was to have what passed by the deed, and what the husband should give by will, as and for her *widow's provision*

in his estate. If she take the gift by deed, she takes it under this condition, "that he might probably fail to make, by a valid last will, such provision for his wife as he would desire;" and when he did make a will making such provision for her as he desired in addition to the gift, the plain sense of the deed was that she should be content with what was so given by him. His devise was made the measure of her rights beyond the deed, provided he made "a valid last will;" in case he did not the deed is silent, and there is no reason to suppose that any intention existed that she was not to take her legal share. The latter event did not happen—a valid will was made. That event was contemplated as the one in which the will was to have effect.

The terms of the deed, though expressed by way of recital, amount to a condition, and when the gift was accepted, has the effect of a covenant to abide by the will. No different sense can be given to the recital of the objects of the deed. They were to give her a certainty if no will was made, and as part of the provision intended for her, if a valid will was made, and by it ample provision for his widow.

The deed and will taken together, show the whole purpose of the testator in regard to the provision intended for the wife. Mrs. Worsley was covert when the deed was made, and could not accept or reject its provisions until the husband's death. When she accepted the provisions of the deed she accepted the will also; by renouncing the provisions of the will she also renounced the provisions of the deed. Both instruments are the acts of the husband, having in view the same object, and dictated by the same motive and intent.

A widow now, in Kentucky, has a legal claim, which is a foundation for the doctrine that whatever the husband advances to his wife, to provide for her after his death, is not a mere bounty, but is intended, by the very act of advancement to her, to be a part satisfaction or performance of his marital obliga-

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tions. See 6 *Watts*, 87; 2 *Sargeant & Randle*, 333; and *Revised Statutes*, 696, sec. 17, which extends the presumption of intention to satisfy to persons other than children; and although the language extends to a particular class of cases the enactment recognizes an equitable rule of construction that applies to other cases of like kind.

It is well settled that if a husband be under covenant to settle money on his wife, and die intestate, her distributive share of his estate is to be regarded as part satisfaction of the obligation. (See *Blandy vs. Widmore*, 2 *Vernon*, 710; 2 *Peere William*, 324, which was a covenant to leave the wife £620; party died intestate; wife's share £620; this is a satisfaction. See also *Lee vs. Cox & D'Aranda*, 3 *Atkins*, 519; 1 *Vesey, Sr.*, 1; *Walker vs. Walker, Ib.*, 54.) So if the husband be under covenant to settle lands upon his wife, of a certain value, and he afterwards purchased lands and take the conveyance to himself in fee, and die without making the settlement, that purchase will be regarded as made in performance of the covenant. (1 *Bright H. & W.*, 488; *Ib.* 306, 451, §1 citing *Tooke vs. Hastings*, 2 *Vernon*, 97; *Wilcox vs. Wilcox, Ib.*, 558; *Goldsmid vs. Goldsmid, Swanton*, 219; *Story's Eq. Jurisprudence*, section 1106, and cases cited in note, and section 1107.)

They proceed upon the idea that when that is done which the decedent was under obligation to do, the courts will not stand upon the particular mode in which it was done, but will see that there be not a double provision, share, or satisfaction. In the language of Lord Hardwicke, (1 *Vesey*, 1,) "When husbands create debts of this kind the intention is that she should have it, without regarding the manner how, and the court leans against double satisfaction."

The case of *Garthshore vs. Chalie*, 10 *Vesey Sr.*, 1, was a case of covenant that the executors should pay the widow, if she survived and had no child, five-eighths, but if a child, then one-half the estate of which the husband should die possessed; nothing said

about her rights in case of intestacy; on his dying intestate the court denied her claim to have both the settlement and her distributive share. The deed recited that this settlement was "for making some provision for her," and it was contended that this was not intended to be a complete provision. (10 *Vesey*, 5.) But Lord Eldon held the above cited cases to be good law, and that the widow could not have both.

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The deed of 1846 being made by the husband in behalf of one "who, independent of it by the relation between them and the provision of the law attaching upon it, will take a provision," the deed "is to be construed in reference to that." (See 10 *Vesey*, 13.) And being so construed it prevents the widow from the renunciation of the provisions of the will, unless she refuses to take under the deed. The half given by the settlement being so construed to have reference to the husband's obligation to make provision for his wife, is inconsistent with her right to take the other half against his will. Commenting upon the doctrine of satisfaction Judge Story says it is "the donation of a thing, with the intention expressed or implied that it is to be in extinguishment of some existing right or claim in the donee. It usually arises in courts of equity as a matter of presumption, where one being under an obligation to do an act, does that by will, which is capable of being considered a satisfaction of it—the thing performed being *ejusdem generis* with that which he engaged to perform." (*Story's Equity*, section 1099; see in connection with this section section 1100 and note 4, appended thereto; see *Rutherford vs. Craik*, 2 *Hey.*, 262.)

1. The principle applicable to election, in cases where dower is claimed, is not analogous to this case. The effect of the distinction which exists is clearly made by Lord Redesdale in *Birmingham vs. Kirwan*, 2 *Scho. & Lef.*, 452, cited with approbation in note 4 to sec. 1088, in *Story's Eq. Juris.* Wills always import bounty. (1 *Cruise*, 128; *Story's Eq. Juris.*, 1100.) Deeds are contracts, import consideration.

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2. The nature of dower right is a right and title to and in the property; the husband cannot convey so as to defeat it; it belongs not to him, but to the wife; the title of the wife is paramount to the title of the husband. (*Adset vs. Adset*, 2 *Johnson's Chancery Reports*, 451, *per Kent*.)

It is not necessary that a provision for the wife should be expressly stated to be in lieu or satisfaction of dower; it will be sufficient if it can be clearly collected from the instrument to be so intended. (See *Bright on Husband and Wife*, 1 volume, section 9, pages 450, 451; *Ib.*, sections 13 and 14; *Hamilton vs. Jackson*, 2 *Jones & L. at page* 295.)

The rules on this subject are now changed to some extent by the *Revised Statutes*, page 281, section 13.

Every case of election pre-supposes "a plurality of gifts or rights, with an intention, *expressed or implied*, of the party who has the right to control one or both, and that one should be a substitute for the other. The party who is to take must choose, but he cannot enjoy both." (*Story's Eq. Jurisprudence*, sec. 1075, note 1; 1 *Bright on Husband and Wife*, 547; *Moore vs. Butler*, 2 *Scho. & Lef.*, 267; 2 *Scho. & Lef.*, 449-50.)

The deed of 1846, in this case, presents a case for election. There is a plurality of rights in the widow; one is the right to the property it conveys to her, the other the right to renounce the will. She must choose; she cannot have the rights under both; to accept the benefit and decline the burden is to defraud the designs of the donor. (*Story's Eq. Jurisprudence*, sec. 1077.)

The answer properly insists that if Mrs. Worsley has accepted the provisions of the deed since the death of her husband, she cannot renounce the provisions of the will, or if she has the right to renounce the will that is or should be treated as a renunciation of the deed also. If she is not barred by the acceptance of the deed from renouncing the will, when she does renounce the will she must bring the prop-

erty in the deed into account. The deed is testamentary in its character; it made a disposition of property in view of death, and makes a provision for after events; it was a provision for the wife after the death of the husband; the deed was in some sense a testamentary paper.

It is insisted that Mrs. Worsley is bound to make an election; she cannot have both the provision made by the deed and claim against the will, but must elect between them, or else bring the advancement into account, as part of her legal half of the estate.

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Bland Ballard for appellee—

The appellants insist that the deed made by W. W. Worsley, in 1846, conveying a part of his estate to his wife, is of a testamentary character, and is to be taken in connection with his will, and both together, as showing the provision intended to be made for Mrs. Worsley; and that Mrs. Worsley cannot be permitted to take the benefit of the deed and renounce the provision made for her by the will, and claim a distributive share of the whole estate.

This defense involves two propositions. The first, that the paper dated in November, 1846, and that dated in June, 1847, are together the will of W. W. Worsley, and that the widow cannot renounce the provisions of the will. This proposition is regarded as absurd. The statute gives a widow the right to renounce the provisions of her husband's will. To contend that a will, if it exist on two papers instead of one, cannot be renounced, is a proposition which cannot be maintained.

Secondly it is argued, that if the widow can renounce that such renunciation will affect her right to the property conveyed by the deed of 1846. There is nothing in the statute allowing a partial renunciation; and if it be admitted that the paper here called a deed and that called a will together constitutes the will of Mrs. Worsley, I think it may be conceded

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either that the renunciation which has been made is ineffectual, or that it applies to the whole will. But in order that the renunciation shall apply to the deed of 1846, the terms of the proposition require that the instrument should not be *a deed* but a testamentary instrument—that is, *a will*. There is nothing in the paper to give to it the character of a testamentary instrument; it is called *a deed*, and it has all the qualities of *a deed*—1st. It took effect immediately upon its execution. 2d. It was irrevocable. 3d. It has none of the forms of a will, or witnessed as a will, or proved as a will.

It is entirely certain that Mrs. Worsley did not intend to renounce the provision made for her by this deed, and it is equally certain that her renunciation did not have that effect, because, 1st. The deed is not the will. 2. The renunciation is to the paper dated in 1847—the *will*. And if it be true that when Mrs. Worsley became discovert, in 1847, she might have refused to hold under the deed, she did not do it or make any disclaimer.

It is said that this case presents the case where the party is bound to make an election; in which Mrs. Worsley cannot renounce the provisions of the will without a surrender of what passed to her by the deed, and if she refuses that she must claim no share of the personal estate.

It is denied that any case requiring an election is presented. Such cases exist only where something is given by will or deed to one who is entitled to some other thing disposed of by the same instrument to another. In such case the devisee or grantee is put to his election whether he will take that which is given or retain that to which he has claim. Mrs. Worsley claims nothing under the will of her husband, and therefore no case requiring an election can arise. A case for election may arise where there is a condition annexed to a devise or grant, with which the devisee or grantee must comply or not take under the devise or grant. There is no condi-

tion annexed to the deed of 1846 which requires Mrs. Worsley to surrender any right or claim. No case has been found where an election has been required except where the condition was positive, express.

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The uniform adjudications have been that no devise—and the same doctrine applies to deeds—will ever be held to be in satisfaction of dower unless it be expressly so, or *the intention clear and manifest*. To establish such implied intention the claim of dower must be clearly repugnant to the will—it must disturb the will. It is not enough that the matter is doubtful whether the testator had in contemplation that his widow should take both estates—she will not be required to do that unless it be *clear* that he designed she should not enjoy both provisions. (*Adset vs. Adset*, 2 *Johnson's Chancery Reports*, 448; 4 *Johnson's Chancery Reports*, 9; *Timberlake vs. Parish's ex'or*, 5 *Dana*, 345; see also *English and American note to the case of Streatfield vs. Streatfield*, *Leading Cases in Equity*, 1st vol., page 283; *Birmingham vs. Kirwan*, 2 *Scho. & Lefroy*, 442; see also *Ellis vs. Lewis*, 3 *Hare*, 310; *French vs. Davis*, 1 *Vesey, Jr.*, 572; *Pitts vs. Snowden*, 1 *Bro. Chancery Cases*, 292; *Pearson vs. Pearson*, *Ib.*, 291.)

Though a will giving a provision give it expressly, “in lieu of dower, inheritance, or other claim on her part,” the wife may take such provision and also her share in after-acquired lands. (*Hall vs. Hall*, 2 *McChord's Chancery Reports*, 269, 299, 306.)

In this case there is not the slightest intimation that Mrs. Worsley is to have no more of the estate of the grantor than that which passed by the deed, and that it was to be in bar of dower or distributive share in the remainder of the estate of the husband; on the contrary a different intent is clearly apparent both from the deed and the will, dated only a few months after the deed, in which was a large provision for the wife.

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The right of dower, and of a distributive share of the estate of the husband are both legal rights; the husband can no more bar the one than the other.—All the authorities in respect to the provisions which will bar a dower claim equally apply to the claim of the widow to her distributive share of the personal estate. In England the case is different; there the widow has no distributive share in the personalty unless the husband die intestate. The English statutes do not allow a renunciation. The only English cases having any application to this case are such as relate to dower, and not those relating to the distributive share of the widow.

The deed makes no reference to any condition which is to be performed by the widow, and on which her right to a distributive share is to depend after the deed of 1846. The property passed by that deed was no part of W. W. Worsley's estate. His will could have no operation upon it, and the renunciation of the provisions of the will by the widow could have no effect upon her rights in the estate of the testator at his death.

M. C. Johnson on the same side—

The only ground urged by appellants' counsel for a reversal of the judgment of the chancellor is that contained in the fifth paragraph of the answer. It is in substance that the terms and implied conditions contained in the deed of W. W. Worsley conveying property in trust to his wife, dated in November, 1846, preclude the appellee, Mrs. Worsley, from retaining the benefit of that deed, and renouncing the provisions of the will.

It is not denied that Mr. Worsley had the right to impose such a condition, and if an intention to impose such a condition is *expressed* in the deed, or can be *legitimately inferred* from its recitals, it is not doubted that the condition can be enforced by compelling the widow to elect between abiding by the will and surrendering the property embraced in the

deed, or by applying the value of the property conveyed by the deed of trust, either wholly or partially, to the satisfaction of her legal interest as widow.

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It is admitted by appellants' counsel that there is no such condition *expressed*, but it is contended that such a condition is to be *implied* from the recitals in the deed. They say that such was certainly the intention of Mr. Worsley, and we concede that if they show such an intention from the *deed itself* their proposition is established. This is believed to be the only issue in the case, and to this question the great body of the authorities cited by appellants' counsel is directed.

The deed conveys to Thomas S. Forman a house and lot, and some servants, for the sole and separate use of Mrs. Worsley, the wife of the grantor, in fee simple, subject to the use, for life, of the grantor, Mr. Worsley, in the event of his surviving his wife.—The object of the deed, as therein expressed, was “to provide, with certainty, a good home for his beloved wife.” The reason expressed in the deed for making this provision, “by an executed deed,” was “that from the uncertainty of life, and other casualties, he might possibly fail to make, by valid last will, such provision for his wife as he would desire.” It is from these recitals of his object and reasons the condition is to be implied.

No intention is perceived, from these recitals, to impose any condition upon this bounty to the wife, or that they contain, expressly or impliedly, any power to the grantor, by a future will, to render this bounty less absolute and unconditional. Mr. Worsley must be regarded as knowing the provision made by law for his wife in case she survived him, and as knowing that unless she survived him she had no legal right to his estate, real or personal. The deed shows that he did not consider those legal rights adequate to the just claims of his wife with whom Providence had blessed him, and he therefore gave her at once a good home, consisting of his residence and house-

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hold servants, to be hers immediately and forever, whether she survived him or not. This cannot be called a provision for Mrs. Worsley as a widow; it is a gift to her as a wife, made as well to supply the absence of all legal right in case he survived her as the insufficiency of her legal right in case she survived him.

It is not contended by appellant that this deed would impair her legal right in case Mr. Worsley had died intestate, and that she could not have claimed her distributive share of his estate, but that it does sustain any will he might afterwards make, to the extent that she should abide by it or give up the benefit of the deed. The main argument in favor of the proposition is that this deed, and a will executed some six months afterwards, are to be regarded as one instrument, "being the offspring of a single intent or motive." Instruments executed at the same time are sometimes construed together as one. It is something new to weld together two instruments of different characters, executed six months apart, and neither referring to the other—on the contrary, the deed reciting the possibility of no will being made as one of the motives for making the deed, and not making at that time a will, which would have been a shorter and more easily executed instrument, rather proves that his mind was not then fully made up as to what will he would make, or whether he would make any at all. The will and deed "being the offspring of a single intent or motive," must be regarded as rather of the private knowledge of the appellant and his counsel, and not inferable from the instruments themselves, or from any evidence in the record. Whether Mr. Worsley, when he made the deed, had any fixed purpose to make a will, or how he would dispose of the remainder of his property, or how often he may have changed his intention in six months, is not shown by any proof, and, as we conceive, was not known to any one but himself.

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Much stress is laid upon the fact, which is assumed, that the two instruments are to be taken as one—as being the offspring of one and the same intent and motive—yet if the condition of the deed be that Mrs. Worsley should abide by the grantor's will, in case he made one, then it does not matter how often he should change his intent and motive; his "valid will," no matter when made, or how often changed, must be abided by or the trust property forfeited. This principle, that a valid deed, operating *in presenti*, cannot be changed or impaired by the grantor by any subsequent act, unless the power to do so is contained in the deed itself, is too familiar to require illustration or authority to support it. The position assumed, that this will, the sole act of the grantor, made six months after, can be used in giving construction to the deed, or of infusing into the deed conditions or terms prejudicial to the grantee, is a disguised denial of that principle.

Although, as contended by appellants, the deed and will may show what provision Mr. Worsley intended to make for his widow at the time the will was written, they do not show what he desired when the deed was made, which desire is the only one that could have any effect upon the construction of the deed.

The authorities referred to by my adjunct show that the law implies no such condition as that contended for; that gifts of this kind to a wife do not put her upon her election between her legal rights and the gift, nor do they operate in whole or in part satisfaction of those rights.

The appellants seek to avoid the force of those authorities—1. By urging that the English authorities, in regard to her distributive share, are not in point, because in England the wife had no legal right in the husband's personal estate at his death. 2. In regard to dower, the decisions do not apply, because the wife has a legal right of dower. It is suggested that appellants' arguments do not harmonize.

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The appellants rely upon the doctrine that advancements and gifts by a parent to a child are construed as made in satisfaction of the moral or imperfect right of the child to a provision from the parent, as applicable to this case. We think they overlook the rule that this doctrine of advancement only applies when there is more than one child, and that a husband can have but one wife at a time, and but one legal widow. The relation of husband and wife has no analogies outside of itself. The circumstances of that relation admit of endless variety in the moral duty and motive of the husband in the provision he may make for his wife. It is a full motive for the absolute gift, by the husband, of his whole estate, while on the other hand it explains the desire of some to deprive the wife of every dollar of her rights in his estate. Every shade of difference between these extremes is found to exist. No inference, therefore, can be drawn from a gift by the husband to the wife, other than that it is a bounty, unless it is otherwise expressed or otherwise provided by law.

The only authorities cited by appellants bearing on the relation of husband and wife, are decisions in regard to the satisfaction of covenants or executory agreements by a husband to make certain provisions for his wife—as for example, to settle lands of a certain annual value being satisfied by a conveyance, in fee, of lands of that value, or covenant to leave, at his death, a sum of money to his wife is satisfied by her distributive share in his estate, to that or a greater amount.

We make the following brief comments on these decisions:

1. They are executory contracts, in which a greater flexibility of construction is allowed than in executed agreements.

2. If applied to this case they would sustain the position that the deed of 1846 should be a satisfaction, wholly or in part, of the widow's legal right of

distribution in Mr. Worsley's estate in case of intestacy, which the appellants themselves repudiate.

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3. Satisfaction is only implied when the thing given, and the right to be satisfied are *ejusdem generis*—that is, land can only operate as an implied satisfaction for land, and personal property for the right to personal property; land cannot so operate for a right to personal property, and *vice versa*. (See 8 *B. Monroe*.) Here the conveyance was of land and slaves, (slaves being in 1846, real estate for most purposes.) To operate at all this conveyance must operate as a satisfaction—as a satisfaction for a right to personal property or money.

The liberality of Mr. Worsley to his wife is justly lauded. His bounty to the Timberlake family may be regarded as a farther bounty to his wife; they were her relations, not his.

Judge SIMPSON delivered the opinion of the Court.

December 24.

In November, 1846, William W. Worsley conveyed to a trustee, for the separate use and benefit of his wife, Rebecca Worsley, a house and lot in the city of Louisville, and also several slaves. He subsequently, in the month of June, 1847, made a will, which after his death in 1852, was proved and admitted to record. His wife Rebecca, who survived him, having within the time prescribed by law, renounced the provisions of his will, so far as they were for her benefit, brought this equitable action against the executor for her distributable portion of the estate.

Her claim is resisted on the ground that, as her husband during his lifetime made a provision for her out of his estate, she has no right to any part of the remainder of it, except such part thereof as he thought proper to bequeath to her. Or in other words, that according to the terms of the deed, she cannot hold under it, and also claim in opposition to the will, by exercising the widow's right of renun-

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1. The husband made a deed to a trustee for the benefit of his wife, and afterwards made his will, the provisions of which were renounced by the widow: Held, that as there was no provision in the deed showing that the wife was to have no more of the estate of the husband than as provided for her by the deed, that she could renounce the provisions of the will, and claim in addition to the property deeded to her trustee, her distributive share of the estate—there being no issue of the marriage is one-half.

ciation, and claiming her distributable portion of the estate.

According to the recitals in the deed of trust, it was executed by the grantor "to provide with certainty a good home for his beloved wife," and it was deemed by him prudent and proper to do so in his lifetime, because "from the uncertainty of life, and other casualties, he might possibly fail to make such provision for her, by a valid last will and testament, as he would desire." The deed does not contain any other recital, or any other provision which indicates an intention on the part of the grantor that the conveyance was made for the purpose of investing his wife with the whole of that part of his estate which he designed her to have, and such an intention cannot be deduced from anything contained in the deed, unless it can be implied from the foregoing recitals therein. So far, however, are they from authorizing such a deduction, that they clearly indicate a different intention, and not only demonstrate the grantor's desire that his wife should be secured in a home, but also that she should have an additional portion of his estate besides that therein conveyed to her. Indeed, according to the language of the deed, a case of intestacy seems to have been contemplated by the grantor, and the estate therein conveyed for the benefit of the wife, was to supply the deficiency which in his opinion would exist in such an event, in consequence of the inadequacy of the provision which the law would make for her.

The grantor certainly had the power to have made the estate conveyed to his wife conditional, if he had thought proper to do so, and he might have inserted in the deed an express defeasance in the event that she claimed any part of his estate after his death; or if such were his intention, he could have stated that the separate estate with which he thereby invested her, was to be all that she was to have out of his estate at any time. But the deed does not contain a condition of any kind, nor any recital or provision

evincing an intention on the part of the testator that she was not to have any more of his estate than was therein conveyed.

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We have considered the deed, in determining its legal effect, without any reference to the will which the grantor subsequently made, because the deed is not testamentary in its character, but is absolute and irrevocable, and its provisions could not be affected nor modified in any manner by the future acts of the grantor. It took effect immediately on its execution, and had nothing testamentary either in its character or its operation. The testacy or intestacy of the grantor could not affect to any extent the rights which the wife acquired under it, they having been created and defined by the deed itself.

It is, however, contended that in equity the estate conveyed to the wife should be regarded as a satisfaction of her legal right to demand a portion of her husband's estate after his death, and cases have been referred to where the wife's distributive share of his estate has been deemed a satisfaction of his covenant or obligation to leave her so much money, or a certain specified part of his estate. But the cases are not at all analagous. Here there was no covenant by the husband to leave money or property to the wife. He had conveyed to her part of his estate which he designed her to have for a certain purpose, by an absolute and unconditional deed. This was a mere gratuity on his part. It could not satisfy any claim she had upon him for a portion of his personal estate at his death, for no such claim existed at the time the deed was executed. He had a right during his lifetime to dispose of his personal estate as he pleased without her consent, provided such disposition took effect before his death, and consequently she had no legal claim to any part of it at the time the deed was executed. Her claim did not accrue until his death, and that claim cannot be considered as satisfied by a donation made to her at the time the claim itself had no existence.

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Neither has the doctrine of election any application in this case, except so far as the widow had by law to elect to take under the will, or to renounce its provisions, and claim her portion as a distributee of her husband's estate. There is no incompatibility in holding under the deed, and claiming her portion as distributee. She was under no obligations to abide by her husband's will. The deed did not impose any such obligation upon her, either expressly or by implication, nor did the law, but by it she was invested with the right which she exercised, of renouncing the provisions of the will. In our opinion, therefore, she is entitled as widow, there being no children, to one-half of the estate in the hands of the executor.

2. An executor is bound to pay to distributees a debt which he owed the testator, and is not entitled to any commission for distributing that fund.

So far as the executor was indebted to his testator at the time of his death, neither his duties nor his responsibilities have been increased by the assumption of the office of executor. It was his duty as a debtor to pay the amount he owed to the person legally entitled to receive it, and no other duty has devolved upon him as executor. The chancellor, therefore, properly refused to allow him any commission on this part of the estate in his hands.

Wherefore, the decree is affirmed.

Case 20.

Franklin Academy vs. Hall, &c.

ORD. PET.

APPEAL FROM CALDWELL CIRCUIT.

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1. A possession of twenty years under a junior patent, with five acres clear, will bar an ejectment under the elder patent, where there is nothing to show that the entry under the junior patent was not intended to be co-extensive with the boundary of the survey.
2. A possession under a junior patent, not within the interference, will not authorize a recovery in ejectment by the elder patentee.
3. The Court of Appeals will, of their own mere motion, award a *certiorari* to the clerk of the inferior court, where there is a strong presumption, from the facts appearing in the record, that the clerk has copied a paper erroneously.

The facts of the case are stated in the opinion of the Court. *Rep.*

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B. & J. Monroe for appellant—

The judgment in behalf of Garret is clearly erroneous. He proved a possession of only two years. (*See Records, page 14.*) And the proof shows that he was within the boundary of plaintiffs' patent at the institution of the suit.

As to Hall's fifty-acre survey he only shows an adverse holding to the extent of about five acres. It does not appear that he intended to take possession to any greater extent.

No brief on file for appellees.

Chief Justice MARSHALL delivered the opinion of the Court.

This action of ejectment was brought in 1849, upon the demise of the trustees of the Franklin Academy, claiming under a patent which issued to the trustees of the Franklin Academy in 1803, and which is the oldest patent exhibited in this case. John Hall, Jr., was in possession for John Hall, Sr., of fifty acres, under a patent for that quantity dated in 1831, and which issued to one Fawn, from whom John Hall derives title by deed. This patent is entirely within the boundaries of the plaintiffs' patent, but it was proved that the claimants under this junior patent had been in possession, within its boundary, for more than twenty years before the commencement of this action, having at first an enclosure of five acres, which had been extended within the twenty years. This was a possession of twenty years, and entitled the defendants, the Halls, to a verdict as to the entire fifty acres, upon the presumption, not contradicted by anything in the record, that the possession was taken and held under claim to the boundaries of the survey.

John Hall, Sr., was also in possession under a patent for two hundred acres, issued to one Green in 1808, one corner of which interfered, to the extent

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1. A possession of twenty years under a junior patent, with five acres clear, will bar an ejectment under the elder patent when there is nothing to show that the entry under the junior patent was not intended to be co-extensive with the boundary of the survey.

2. A possession under a junior patent not within the interference, will not

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authorize a re-
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der patentee.

3. The Court
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ously.

of a very few acres, (apparently not more than five or six,) with the elder patent of the plaintiffs' lessors, as claimed by them, But he had no enclosure, nor any actual possession within the interference; and as his possession, outside of the elder patent, could not be extended within it by mere presumption or construction, there was no possession of this small interference, to obstruct the right of the elder patentees, and the defendant, John Hall, Sr., was entitled to a verdict as to this interference, because he was never in possession of it.

The defendant, John Garret, exhibited a patent to himself, dated in 1839, for two hundred and fifty acres, lying wholly within the boundary of the elder patent as claimed, and proved that he had been in possession, and lived within the boundaries of his patent for (as the copy of the bill of exceptions in the transcript states,) two years last past—that is, preceding the trial, which was on the 29th day of April, 1851. But two years last past would not reach back to the time when the notice in this action was served on Garret. If the proof as to Garret's possession be truly stated in the transcript, he had no pretext for claiming protection on the ground of length of possession; but the court gave an instruction with reference to the case, which authorized the jury to find for him, on the ground of actual settlement and residence within his patent for more than seven years before the commencement of the action. This, upon the proof as stated in the record, would have been so palpably without foundation or authority in the evidence, that looking to the date of Garret's patent, more than eleven years before the trial, and considering the fact that a possession of two years before the trial would not include the commencement of the suit, and could not possibly have constituted even a supposed bar to the action, we think there is, in all probability, a mistake in copying the bill of exceptions into the transcript, and as we know that the words *ten* and *two* are often so

written that it is difficult to determine which was intended, we may conjecture that the proof was that Garret had been living within his patent for ten instead of two years, and that it was so stated, or intended to be so stated, in the original bill of exceptions. If this be so the instruction had a sufficient basis in the evidence with respect to Garret's case as well as the others, and as there would have been no error in giving or refusing instructions, the judgment would be affirmed ; but as we cannot, upon this conjecture, however probable, affirm a judgment which, as the record stands, is obviously and substantially erroneous, we suspend the determination of the case in this court until the return of a *certiorari*, which, as the affirmance of the judgment depends upon it, the court orders, *ex mero motu*, for the purpose of ascertaining with more certainty than at present, the true state of the evidence with regard to Garret's possession within his patent.

Wherefore it is ordered that a *certiorari* be issued from this court to the clerk of the circuit court of Caldwell county, requiring him to certify a true copy of that part of the bill of exceptions in this case which follows immediately after the statement of the reading of Garret's patent, and states the proof made by him, beginning with the words "and proved he had been in possession," and closing with the words "years last past."

Afterwards, it appearing upon the return of the *certiorari* that the bill of exceptions states that the defendant, John Garret, proved "that he had been in possession, and lived within the boundaries of his patent ten years last past;" therefore the judgment is affirmed.

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Case 21.

Wheeler, &c. vs. Jennings, &c.

PET. EQ.

APPEAL FROM ANDERSON CIRCUIT.

1. Slaves acquired by the wife since the passage of the act of February, 1846, are not liable for the debts of the husband; and the husband's possession of them for five years will not render them liable for his debts.
2. Where the possession of slaves was acquired from the father of the wife, by the husband on loan, before the passage of the act of 1846, and given to the wife after the passage of the said act, before the husband had five years possession, they were not liable for his debts. The possession, after the gift, was in right of the wife.
3. The act of 1846 does not require a gift of slaves to a *feme covert* to be evidenced by deed of record; a verbal gift is as effectual as a deed of record.

The facts of the case are stated in the opinion of the court.—*Rep.*

Robinson & Johnson for appellants—

Did the circuit court decide correctly in giving to Mrs. Jennings the slaves sought to be subjected to Jennings' debts? We contend that it did not. Although the evidence is contradictory there are some facts undisputed. It is conceded that the negro woman was placed in possession of Jennings when he went to housekeeping in 1842, by his father-in-law, Gen. Lillard, and that she remained, without any visible change, in his possession, (he exercising acts of ownership, and giving her in for taxation,) until his death in 1850, a period of about eight years. It is also conceded, or cannot be denied, that his creditors could have no means of coming to the conclusion that these slaves were not his property; and under such a possession his creditors were warranted in the opinion, that whether a loan or a gift they were equally his property, and liable for his debts. It is contended, for Mrs. Jennings, that the possession was originally under a loan, and it is conceded that

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if the loan had been continued the slave would be liable; but it is also said that a few months before the five years expired General Lillard made an entry on his books, charging Mrs. Jennings with the slaves at \$500; and it is also contended that this private entry changed the nature of the possession without any new act, so that, at the end of five years, they would not be liable for his debts. If this be the law the rights of creditors and purchasers are in great peril. As this court has never decided this question, a few considerations will be suggested, whether the positive provisions, as well as the spirit of the statutes for the protection of creditors against the frauds arising from secret loans, does not require the loan to be recorded, or the possession visibly broken before the five years of possession are passed, and after being thus visibly broken the gift be made.

If slaves may be protected by a mere operation of the mind of the loanor or donor of slaves, (for the charge on his books is wholly immaterial, except as fixing the time, and corroborating his testimony,) purchasers as well as creditors of persons who received slaves within five years before the act of 1846 are wholly committed to the tender mercies of fathers, mothers, and brothers of the claimants of such slaves. With what perfect safety could the father swear to the intended operations of his mind—his private intention at one time, and the equally private intention at another?

It is insisted that the weight of the testimony shows that the negro girl was given, and not loaned, in 1842, when Jennings first received the possession.

The sale should be set aside, as bidders were prevented from bidding, and competition was put down by assertions that the sale was illegal, and could not be sustained.

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John Draffin on the same side—

The negro girl was placed in the possession of Jennings when he went to housekeeping, in 1842, by his father-in-law, Lillard, and remained in his possession until his death, in 1850, without any visible change in that possession.

The legal presumption arising on the facts of this case is that it was a gift of the slave. (*Smith vs. Montgomery's adm'r*, 5 *Monroe*, 504.)

It is further insisted that the proof clearly shows that the girl Winny was *given*, and it was the source of some family feeling on the part of the step-mother of Mrs. Jennings.

But if the court shall conclude that there was not in fact a gift of the slave, still it is insisted that the possession having continued more than five years the slaves are liable to creditors. No visible change whatever in the possession for about eight years, during all that time the debts in controversy were being created, on the faith of the liability of this property. The court is referred to the case of *Grigg vs. Sowards*, 9 *Dana*, 332.

J. D. Hardin for appellees—

Mrs. Jennings claims the slaves in controversy under a gift from her father in 1847, and insists that they are not liable to the payment of the debts of her late husband. The circuit court sustained her claim, and that is the principal matter of controversy in this appeal.

The proof clearly shows that Jennings had not possession of the slave Winny for five years before the gift by Gen. Lillard to Mrs. Jennings, in February, 1847. (See *Penny vs. Davis*, 3 *B. Monroe*.) The possession of Jennings, after the gift in 1847, was the possession of the wife, and consistent with her right; and the statute of 1846 requires no record evidence of a gift to protect the right of the wife.

The testimony very clearly shows that the slave was loaned in the summer of 1842, and given in February, 1847.

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Judge SIMPSON delivered the opinion of the Court.

December 26.

The question of most importance in this case is that which involves an inquiry into the validity of the claim asserted by Mrs. Jennings to the slaves Winny and her children. She claims them under a gift from her father, made since the passage of the act of February, 1846, to protect the rights of married women. The creditors of her deceased husband contend that they belong to his estate, or at any rate are liable for the payment of his debts, as he had them in his possession, prior to his death, during a period of more than five years.

The first question to be determined is at what time was the gift actually made? Jennings commenced housekeeping in the summer of 1842, at which time the slave Winny, not then having any children, came to his possession. He continued in the possession of her from that time until his death, in 1850; and whilst he had her in possession her children were born. The widow contends that her husband acquired the possession from her father in 1842, under a loan, and that no gift was made until February, 1847, at which time the slaves were given to her by her father, to whom they still belonged.

Upon a careful examination of the testimony on the subject we have come to the conclusion that no gift was made of the slave at the time she originally went into the possession of Jennings, but she was merely loaned to his wife by her father, and that the possession of her continued under that loan until February, 1847, when she and her children were given to Mrs. Jennings by her father.

It is however contended that as the possession of Jennings commenced prior to the passage of the act of 1846, and continued subsequently until five years had elapsed, that the slaves thereby became liable

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for the payment of his debts, notwithstanding the possession may have originally commenced under a loan, and the gift to his wife may have been made before the possession under the loan had been continued five years.

1. Slaves acquired by the wife since the passage of the act of February, 1846, are not liable for the debts of the husband, and the husband's possession of them for five years will not render them liable for his debts.

Slaves acquired by the wife since the passage of the act of February, 1846, are not liable for the husband's debts; they cannot be rendered liable therefor by the husband's possession of them for five years; the possession, in such a case, is consistent with the right of the wife to the property; it is where the law places it, and it would be an anomaly to permit a possession which is not only sanctioned by law, but actually acquired under its operation, to have the effect to divest the right of the wife, and to subject the property to the payment of the husband's debts. It would be wholly inconsistent with the intention of the legislature, and virtually defeat the object which the passage of the act was designed to accomplish.

2. Where the possession of slaves was acquired from the father of the wife, by the husband on loan before the passage of the act of 1846, and given to the wife after the passage of the said act before the husband had five years possession, they were not liable for his debts. The possession, after the gift, was in right of the wife.

Should then the fact that the possession was originally acquired under a loan, and was commenced before the passage of the act of 1846, render the slaves liable for the husband's debts, when the possession had been continued five years, although they had been given to the wife after the passage of that act, and before the expiration of the five years? We think it should not. When the gift was made the title to the slaves vested in the wife, and the possession was subsequently continued under her title. The slaves, at the time of the gift, were not liable for the debts of the husband, and any subsequent possession by him did not render them liable, because the possession was not continued under the loan but under the title of the wife.

It has been argued that the creditors of the husband were not apprised that the loan had been changed into a gift, the act being of a private nature not evidenced by a deed of record; that the possession of the slaves by the husband gave him a delusive credit, and therefore both the safety of creditors

and the policy of the laws require the subjection of the slaves to the payment of the debts of the husband.

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The act of 1846 exempts slaves which may be given to the wife from liability for her husband's debts, whether the gift be oral or by deed. The fact, then, that the gift in this case was not evidenced by a deed of record, cannot alter the law on the subject. And with respect to the credit which the possession of the slaves was calculated to give to the husband, it may be remarked that the same delusion may exist where the slaves have come into the possession of the husband since the passage of the act, under a gift to the wife, as such possession may to some extent give him a delusive credit; but that cannot be permitted to affect the rights of the wife. The passage of this act renders it necessary that persons dealing with the husband shall, before they give him credit in consequence of his having slaves in his possession, institute an inquiry into the nature of the title, and the character of the possession. By the law now existing, the possession of the husband is not even *prima facie* evidence of the title in himself, so far as the rights of the wife may be affected by it.

3. The act of 1846 does not require a gift of slaves to a *feme covert* to be evidenced by deed of record; a verbal gift is as effectual as a deed of record.

The motion to quash the sale of the real estate was properly overruled. It did not certainly appear that it could be sold for a better price, or that any valid reason existed for ordering a re-sale of the property.

Wherefore, the judgment is affirmed.

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vs.
BRECKINRIDGE,
&c.

Case 22.

Burch and Wife, &c. vs. Breckinridge, &c.

PET. EQ.

APPEAL FROM HENDERSON CIRCUIT.

1. The act of 1796, subjecting trust estates to the payment of the debts of the *cestui qui trust*, has no application to the separate estate of a *feme covert*.
2. As a general rule a *feme covert* cannot, according to the common law, contract as a *feme sole*, nor as such sue or be sued. Courts of equity acting upon this principle, have held that a *feme covert* cannot bind herself personally, nor bind her separate estate by her general personal engagements. (2 *Roper*, side page 235; 10 *B. Monroe*, 390.)
3. A *feme covert* may charge her separate estate whenever she thinks proper to do so. This intention must be manifest. It is not sufficient that she create debts. There must be an agreement express or implied to charge her separate estate.
4. The execution of a note, or endorsement of a bill of exchange, has been regarded as manifesting an intention by a *feme covert* to charge her separate estate. (7 *B. Monroe*, 293; 13 *Ib.*, 384.)
5. Land, the separate property of a *feme covert*, cannot be made liable to satisfy debts created by verbal contracts. She cannot alien by parol, nor can she charge it by parol contract, (2 *Atkins*, 379,) otherwise in respect to her personal estate, where the charge will be limited by the intention to charge it.
6. The trustee holding the title to the separate estate of the wife, cannot charge the same with her debts—her consent is indispensable.
7. Where infants appear in court on their own petition to be made parties, process is not necessary; that the court appointed a guardian *ad litem* to answer, was sufficient.

On the 19th day of October, 1841, Alex. M. Burch conveyed to James K. Burch certain slaves and other property in trust for the benefit of his wife, Elizabeth M. Burch, during her life, with remainder to the children of said Alex. M. and Elizabeth M. Burch. The deed of trust was duly recorded in the county court clerk's office of Fayette. All the property specified in the deed of trust belonged to Elizabeth M. Burch before the marriage. In 1848, by a decree of the Fayette circuit court, James P. Breckinridge was appointed trustee in the place of James K. Burch, who declined farther to act. Debts to a considerable amount were contracted by Mrs. E. M. Burch for

the support of herself and family, and Breckinridge, the trustee, had made considerable advancements to her. In 1849 he filed his bill in the Henderson circuit court where all the parties lived, asking a settlement of his accounts as trustee, and the payment of the debts contracted by Mrs. Burch for the support of herself and family; and that a sufficiency of the trust property be sold to pay the debts, and that another trustee be appointed. Various persons, claiming to have demands against Mrs. Burch, were made parties, who set up claims; and the infant children of A. M. and E. M. Burch were also made parties at the instance of their father as their next friend. The circuit court on final hearing removed the trustee, and decreed that the various claims set up against the trust estate (amounting to about \$4,000) be paid, and that the life estate of Mrs. Burch in so many of the slaves as should be necessary to pay the demands should be sold, and the proceeds applied to that purpose; and that the purchaser be required to give bond to A. M. Burch and Helen M. Burch, the two infant children, to surrender the slaves, if living, upon the death of E. M. Burch, and in the mean time not to remove them out of the state.

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From that decree Burch and wife, and the heirs, have appealed to this court.

James Harlan for appellants—

Relied upon the following grounds for the reversal of the decree:

1. The proper parties were not before the court. James K. Burch, in whom the legal title in the property was vested by the deed of trust of the 19th of October, 1841, was a necessary and indispensable party to the suit.

2. The children of the appellants (Alexander M. and Helen M.) were not properly before the court. Neither of them was served with process; nor was any order made appointing a guardian *ad litem* to defend for them; nor was any time given them after

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they arrived at full age to show cause against the decree. (2 *Marshall*, 235; 3 *Marshall*, 143; 4 *J. J. Marshall*, 567; 1 *Dana*, 369.)

3. The exceptions of the appellants to the report of commissioner Rankin, should have been sustained by the circuit court.

4. The court erred in rendering a *joint* decree against the husband and wife for the supposed debts of the latter. No decree should have been rendered against the husband.

5. The decree subjecting the trust property to the payment of either of the claims set up against it is erroneous. If the trust property were liable, that liability could only extend to the unappropriated profits.

6. The court had no power to render a decree exceeding the annual profits of the trust property.

7. The rights of those entitled in remainder were not properly secured by the decree.

8. The court erred in decreeing that the property, to-wit, the life estate of Mrs. Burch, should be sold in satisfaction of the claims set forth in the pleadings.

9. The decree is for more than the evidence authorized, admitting the complainants were entitled to a decree for any amount.

10. The same grounds are relied upon for the reversal of the decree upon the writ of error prosecuted in the names of Alexander M. Burch, the younger, and Helen M. Burch, children of the appellants.

L. W. Powell for appellees—

1. It is contended by appellants that James K. Burch, the first trustee, was a necessary party. He had no interest in the controversy. The only interest he ever had was as trustee; from that he had been removed by the chancellor, who had ample power to do so. And by his removal and the appointment of another trustee to carry into effect the trust, the title to all the property passed to the se-

cond trustee. (See *Hill on Trustees*, p. 11.) The appointment was made in accordance with an express provision in the deed of trust, that "in case of the death of the trustee, or his inability to act, the Fayette chancery court shall have power to appoint a new trustee, who shall have the powers, rights and titles vested in the said James K. Burch." The record shows the appointment of J. P. Breckinridge. It is so alleged in the bill, and admitted in the answer.

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2. It is also contended that the infant children were not regularly before the court. They, by their father as next friend, filed their petition to be admitted as parties—they were made parties by the order of the court. It was not necessary that process should issue against them in such a state of case—(see *Gashwiller's heirs vs. McIlvoy*, 1 *Marshall*, 85)—a guardian *ad litem* was appointed for them.

The decree was properly rendered against A. M. Burch and wife. His interest is only affected so far as he might have a benefit from the life estate of his wife in the property. The interest of the children to the remainder is well protected by the bond required by the decree of the court. They have no interest in the property until the death of their mother, and it was therefore erroneous to give them day after their arrival of full age to show cause against the decree. There is no decree against them or their interest.

3. The circuit court did not err in decreeing satisfaction of the debts by a sale of the interest of Mrs. Burch in the trust property. The debts were contracted by Mrs. Burch for the benefit of herself and family, and it was understood by her, and those who credited her, that the credit was given upon the faith of the trust property; that A. M. Burch, the husband, was insolvent, and that she had no other estate but that held in trust.

The statute of 1796 makes the interest of the *cestui*

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qui trust liable for debts as estates held in fee. (*Stat. Lau*, 443.)

It would require an unreasonable length of time to pay the debts, amounting to about \$4,000, out of the hire of the slaves, which would not exceed \$600 a year, and by the death of some of the most valuable of the slaves, or the early death of the tenant for life, payment might be wholly defeated. We insist on an affirmance.

January 10.

Judge SIMPSON delivered the opinion of the Court.

1. The act of 1796, subjecting trust estates to the payment of the debts of the *cestui qui trust*, has no application to the separate estate of a *feme covert*.

The act of 1796, subjecting estates held in trust to the payment of debts, has no application in a case of this kind. The deed vests in the wife a *separate estate*, which belongs to her, exclusive of her husband, and which in many respects is entirely dissimilar to other estates that are held in trust. (*Sharp vs. Wickliffe*, 3 *Littell*, 12.)

2. As a general rule a *feme covert* cannot, according to the common law, contract as a *feme sole*, nor as such sue or be sued. Courts of equity acting up on this principle have held that a *feme covert* cannot bind herself personally, nor bind her separate estate by her general personal engagements. (2 *Roper*, side page 235; 10 *B. Mon.*, 320.)

As a general rule, a married woman cannot, according to the common law, contract as a *feme sole*, nor as such sue or be sued. That being the legal rule, courts of equity acting in conformity with it, have held that the wife cannot bind herself personally, nor bind her *separate estate*, by her general personal engagements. If, therefore, the wife contracts debts generally, without doing any act indicating an intention specifically to charge her separate estate with the payment of them, a court of equity will not direct an application of such estate to be made for that purpose. (2 *Roper*, side page, 235; *Coleman vs. Woolley's ex'r*, 10 *B. Mon.*, 320.)

3. A *feme covert* may charge her separate estate whenever she thinks proper to do so. This intention must be manifested. It is not

Courts of equity, however, as a consequence of the doctrine established by them, that a married woman may have and enjoy separate estate, enable her to deal with it, and to alien or incumber it, when she shows an intention so to dispose of it, but that intention must be manifested by her, otherwise her separate estate will not be held liable. Its liability for her debts does not arise out of their creation merely,

but out of an agreement by her, either express or implied, that it shall be liable for their payment.

It has been held by this court, that the execution by a *feme covert* of a bond or a promissory note, or the endorsement by her of a bill of exchange, should be regarded as a sufficient indication of her intention to charge her separate property with the payment of the debt. In such cases, although no reference be made to her separate estate, the execution of the security is deemed to be an implied agreement on her part that it shall be liable for the demand. (*Jarman, &c., vs. Wilkerson*, 7 B. Mon., 293; *Bell & Terry vs. Kellar*, 13 B. Mon., 384.)

The extent to which her separate property may be subjected to the demands of creditors, claiming under parol agreements, has not been determined by this court. So far as the separate property consists of land, it cannot be made liable by a verbal contract. The wife cannot alien or dispose of her real estate except by a written agreement, and as a charge upon it for the payment of debts operates as a disposition of it *pro tanto*, it can only be created by a contract in writing. (*Clark vs. Miller*, 2 Atk., 379.) But with respect to her other separate estate, consisting of personalty and slaves, where she has verbally agreed that part of it shall be appropriated to the payment of a debt which she is about to create, there seems to be no good reason why this agreement should not be regarded as constituting a charge upon it. Where, however, a verbal agreement is made, without any reference to her separate estate, then it will not be bound, unless the circumstances are sufficient to prove that, in fact, the understanding between her and the person with whom she has contracted, was that it should be liable. But where there is no express agreement, and one arises only by implication, a court of equity will not allow such implied agreement to extend to any except that part of the estate which, it may be inferred from the cir-

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sufficient that she create debts. There must be an agreement express or implied to charge her separate estate.

4. The execution of a note, or endorsement of a bill of exchange has been regarded as manifesting an intention by a *feme covert* to charge her separate estate. (7 B. Mon., 293; 13 B. Mon., 384.)

5. Land, the separate property of a *feme covert*, cannot be made liable to satisfy debts created by verbal contracts. She cannot alien by parol, nor can she charge it by parol contract. (2 Atk., 379,) otherwise in respect to her personal estate, where the charge will be limited by the intention to charge it.

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6. The trustee holding the title to the separate estate of the wife cannot charge the same with her debts—her consent is indispensable.

cumstances, the wife intended to charge with the payment of the debt.

Now, applying these principles to the demands asserted in the present suit, and the right of the creditors to any relief is very questionable. No express agreement by the wife to charge her separate estate for the payment of these debts, was either alleged or proved. The mere fact that they were contracted by her, does not, as we have seen, render her *separate estate* liable for their payment. Were they, then, contracted under such circumstances as will justify the presumption that the contracting parties understood that they were to be a charge upon her separate property? The wife did not, when the debts were created, live apart from her husband, nor is it shown that he was insolvent. The only circumstance from which it can be inferred that an understanding existed, both on her part and the part of the creditors, that the debts were to some extent to be a charge upon her *separate estate* is, that the accounts were created in the name of the trustee, as may be presumed with her knowledge and consent, inasmuch as she executed receipts to him for some debts which had been created in the same manner, and had been paid by him. The agreement of the trustee that her separate property should be liable for the debts, cannot create any charge upon it. Her own contract is indispensably necessary for this purpose, and such a contract on her part can only be implied in this case from the fact that she knew her creditors looked to her separate property for the payment of their debts, and with this knowledge continued to deal with them, and permitted her trustee to pay the debts thus contracted by her, out of her estate. On this ground, we think her separate estate should be chargeable with the payment of these debts.

But the question still arises as to how far a court of equity will extend this implied agreement by her, that her separate estate should be liable for the payment of these debts. They were all created merely

for the current expenditures of the family ; none of them arose out of a contract for the purchase of land or slaves, or for any property but such as would be consumed in the use. It cannot be presumed, in the absence of any express agreement to that effect, and without the execution of a security in writing, that she intended to create a charge on the principal of her estate, and subject it to sale for the payment of store accounts and other current family expenditures. The only reasonable and legitimate presumption is that she intended the profits of her estate to defray her current expenses, and a court of equity should not carry the implication against her to any greater extent. If parties deal with a married woman, without any express contract in reference to her separate property, they have no reason to complain if, in furnishing her with articles for consumption merely, they are restricted to the profits of her estate, and are not permitted to subject the estate itself to sale for the payment of their demands.

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It is true, that in this case the defendant has been improvident, having in less than two years incurred a debt of some four thousand dollars, when the annual profits of her estate did not probably exceed some five or six hundred. But her trustee, instead of checking this improvidence on her part, seems rather to have encouraged it, by advancing her money, paying off her bills, and taking receipts from her for the whole of it. From these acts of his, she may have inferred that the profits of her estate received by him were sufficient to meet all these disbursements, as he only required her to execute receipts to him as her trustee, and never intimated to her that a sale of any part of her separate estate would be necessary for their payment. He clearly has no claim against any part of her estate except the profits. It cannot be presumed that by executing receipts to him for money, she intended to charge any part of her estate but that which came into his hands as money. He could not, by the terms of the trust, convert any part

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of the trust estate into money, except the profits.— If any of the property itself were sold, the proceeds were, by the terms of the trust, to be re-invested, and the property purchased was to be subject to the same restrictions and limitations that the property sold had been subject to. The trustee, to put the most charitable construction on his conduct, acted with great indiscretion, and without a due regard to his duty, in creating a debt against his *cestui qui use*, exceeding very considerably the profits of her estate, and that in a manner which was calculated to induce her to believe that he had the money in his hands, and only wanted her receipts to show how it had been appropriated. Under these circumstances, it is equitable and just that the payment of his debt should be postponed, without interest, until the debts due to the other creditors be paid out of the hires of the wife's slaves.

No part of the wife's separate property, except the hire of the slaves, is to be subjected to the payment of any of the demands asserted in this suit.— These hires must be first applied to the payment of such debts, excluding that due to the trustee, as was contracted by the wife, or by her order. For these debts no personal decree should be rendered against the wife, but the decree for their payment should be *in rem* against the profits of her estate, the land excepted. They should be paid ratably out of the annual profits until they are discharged; and then these profits should be applied to the payment of the debt due to the trustee. The profits of the land are not subjected, because a disposition of the anticipated profits of real estate, is substantially a disposition of the estate itself, during the time that the profits are disposed of, and a contract to effect that object must be in writing. Besides, in creating an implied agreement on the part of the wife to charge the profits of her separate estate, it ought not to be presumed that she intended to divest herself entirely of all means of support; and for this reason, also,

this implied agreement should not be extended to the profits of her real estate.

With respect to the errors assigned by the infants on the writ of error sued out by them, none of them seem to be available, except the one relating to the merits of the decree. As they were made parties upon their own petition, they were in court, and the service of process upon them was unnecessary. A guardian *ad litem* was appointed for them by the court, and their answer was filed by him. If it had been proper to decree a sale of their mother's life estate in the slaves, their interest in remainder was as well guarded and secured by the decree as it could be, and they were not prejudiced by the omission to give day to show cause against it. But a sale of the life estate was more prejudicial to them than the annual hiring of the slaves would be, because their estate in remainder will be in less jeopardy, and be subjected to less hazard, from the latter, than it would be from the former mode of subjecting it to the payment of these debts. The purchaser of the life estate might remove the slaves to parts unknown, and he and his security in the bond, which he was required to execute to have them forthcoming, might both become insolvent before the expiration of the life estate. This hazard will not be incurred when the slaves are only hired by the year, so that the decree, as rendered, was prejudicial to the children, as well as to their mother.

As the wife has the right to sell her estate for life in any of her separate property, she may do so if she thinks proper, for the purpose of creating in that way a fund for the payment of these liabilities, instead of having them discharged in the manner pointed out in this opinion.

Wherefore, the decree is reversed upon the appeal taken by the husband and wife, and also upon the writ of error prosecuted by the children, and cause remanded with directions to ascertain what amount of the debts sued for were contracted by the

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7. Where infants appear in court, on their own petition, to be made parties, process is not necessary; that the court appointed a guardian *ad litem* to answer, was sufficient.

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wife, or by her order, and for further proceedings and decree in conformity with this opinion.

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PET. EQ.

APPEAL FROM KENTON CIRCUIT.

1. One having an interest both for plaintiff and defendant, but whose interest preponderates on one side, is not a competent witness for that party on whose side his interest is greatest; nor is his wife. The rule is general, almost without exception, that a vendor is a competent witness for his vendee, but incompetent for a creditor of such vendor, who levies upon property, to prove fraud in the transfer.
2. Where there has been a fraudulent sale made with the intent of securing to the vendor a future interest in the property, and the sale is for less than the value of the property, the chancellor will set aside such sale, and subject the property to the payment of debts due to judgment creditors.

The facts of the case are stated in the opinion of the court. *Rep.*

J. W. Stevenson for appellants—

The first question presented in this record is, whether the Circuit Court erred in the exclusion of the depositions of Myers and wife? Their testimony, if admissible, clearly and abundantly establishes the fraud in the sale of the attached boats, by Myers to Williamson. The competency of Mrs. Myers rests upon the competency of her husband. We maintain that Myers was a competent witness, and that his deposition, with that of his wife, were erroneously excluded.

1. An equipoise of interest between plaintiffs and defendants, on the part of a witness, renders him competent. (*Wright vs. Nichols*, 1st Bibb, 299; *Douglas vs. Holbert*, 7 J. J. Marshall, 2; *Bement vs. McClaren*, 1 Ben Monroe, 296; *Tyler vs. Trabue*, 8 Ben Mon-

roe, 308; *Van Meter vs. McFadden*, 8 Ben Monroe, 439; *Adams vs. Gardiner*, 13 Ben Monroe, 202.)

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That Myers was clearly responsible on his bill of sale, if made in good faith, for the title of the boats, is clearly shown by the instrument itself. There is an express warranty from all incumbrances; and if this responsibility exists, it is admitted that his interest is balanced. The opinion of the Circuit Judge assumes, however, that the sale, as between Myers and Williamson, was made to defraud the creditors of Myers; and that, consequently, Myers would not be responsible on his warranty to Williamson; and his interest, therefore, was *not balanced*. We admit, that decisions are to be found, going to the extent, that a fraudulent vendee cannot recover back the consideration money mentioned in a fraudulent deed. Such was the case of *Surlott vs. Beddow*, 3 Monroe, 109, so confidently relied on by the Court below. We deny, however, that this or similar decisions, are decisive of the question of the competency of Myers; and if they were, the whole current of modern authority have overruled them, and permitted a fraudulent vendor always to testify as between his vendee and attaching creditors.

In the case of *Findley vs. Cooley*, 1 Blackford R., 263, it was held, that the vendee of real estate can not object to the payment of a note for the purchase money, upon the ground, that the conveyance had been made to defraud creditors. "Such a conveyance, (says Judge Blackford, in delivering the opinion of the Court,) though liable to be objected to by creditors, is not absolutely void, either at common law or by statute; it is valid as to the parties themselves." So, too, in the case of *Surlott vs. Beddow*, law or by statute; it is valid as to the parties themselves. Surlott was allowed to recover back all the money advanced by him for Beddow, under the fraudulent arrangement made between them to defeat Beddow's creditors; and to that extent, this case established a liability on the part of a fraudulent vendor to his vendee. So, too, in *Elridge vs.*

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Wadleigh, 12 Maine, 371. The Court say, "Though, as a general rule, a vendor can not be called as a witness for his vendee, to sustain his title, when that title is called in question, yet he may be in cases where his interest is balanced. As where goods are attached as the property of the witness, and replevied by his vendee. If the vendee prevails, his warranty, express or implied, is satisfied; if the creditor prevails, the value of the goods is applied to witness' debts." In a still later case, from the same Court, (*Cutter vs. Copeland, 18 Maine, 127.*) the precise question of competency, in a case in all respects like this, was sustained. The Court hold, "That where the question is, whether it shall be subject to the attachment or seizure of a creditor of a vendor, upon THE GROUND THAT THE SALE WAS FRAUDULENT, the interest of the DEBTOR OR VENDOR IS BALANCED, and he IS A COMPETENT WITNESS FOR HIS VENDOR OR ASSIGNEE."

In support of this decision, see *Moulton vs. Moulton, 1 Shepley, 110; Brown vs. Marsh, 8 Vermont, 310-12; McKay vs. Treadwell, 8 Texas, 176.* So, too, a vendor of a horse is a competent witness between the buyer and an attaching officer, on the question whether the sale was fraudulent against creditors, his interest being balanced. *Ward vs. Chase, 35 Maine, (5 Red.,) 515.*

A similar question has also been decided by this Court, in *Baylor vs. Smithers' Heirs, 1 Littell, 111.* The facts of that case were, that Smithers' heirs sued Baylor for a slave, which Baylor had purchased under an execution against Shirley. Shirley was offered as a witness to prove how he held the girl under the ancestor of the plaintiffs. An attempt was made on the trial, to prove a fraudulent and collusive combination between the ancestor of the plaintiffs, and the witness and defendant in the execution, (Shirley,) and it was contended, that Shirley was an incompetent witness to prove the alleged fraud, and ought to have been excluded. The Court say, "That the assumed argument assumes an objection which

goes to the credit and not to the competency of Shirley. A *particeps criminis* has always been held a competent witness; and by the Supreme Court of New York, a defendant in an execution was held competent to disprove fraud, alleged to have been committed by him, on the sale and conveyance of property taken and sold to satisfy an execution which issued against his estate." (6 *Johnson*, 135.)

"The contest in that case was between the vendee of the witness, and the purchaser under execution; and before the witness was introduced, his interest was released by the vendee; whereas, in the present case, there was no such release to Shirley; but we have seen that Shirley can have no interest in the event of the suit; and the case cited shows, if he have no interest, he is competent."

The facts of that case greatly resemble this. Shirley advanced to Smithers a sum of money, and took an absolute bill of sale for a slave. This slave is sold on an execution against Shirley; and in a contest between Smithers' heirs against the execution purchaser, Shirley is decided to be competent. If the sale is declared to be void, Shirley will again have to pay Baylor's debt, but he will be entitled to recover back the money paid to Smithers; or, if not entitled to recover it back, on account of his participation in the fraud, still he is decided to be competent. So again in *Ragland vs. Wickware*, 4 *J. J. Marshall*, 530, a *particeps fraudis* was held a competent witness to sustain a fraudulent bill of sale.

Waiving, however, entirely the depositions of Myers and wife, the decree of the Circuit Court cannot be sustained.

We confidently submit, that this Court has rarely been invoked to examine a record in which the *indicia* of fraud have been more indelibly impressed upon any attempted sale of property, than those which are developed in this transfer from Myers to Williamson.

Every circumstance, from the inception to the completion of the alleged bill of sale, clearly indicate,

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that the sole object of its execution was to place these boats temporarily beyond the reach of Myers' creditors, until the anticipated profits of the fall and winter season would enable him to reduce, if not entirely liquidate, his debts. The alleged sale was wholly *fictitious*, as a brief notice of some of the facts and circumstances attending it, clearly and conclusively demonstrate.

1. The vendor, Myers, was heavily oppressed with debt on 19th October, 1853, the date of the bill of sale for these two boats. The judgments which constitute the foundation of the present suit, were then in full *force and effect*. In addition to these heavy amounts, there were other heavy claims against Myers. The deposition of one of these creditors (Isham) show, that his firm was becoming restless and uneasy, and that Myers' fear of attachment was well founded.

2. These boats were sold at a price and on terms wholly inconsistent with the idea that the sale was real. The sum agreed to be paid by Williamson was greatly below the true value of the boats. It was greatly less than Myers had been offered for them some months before. The witness, J. C. Riley, proves that before any repairs were put on the boats, he offered eighteen thousand dollars for them. He proposed paying nine thousand dollars in cash, and the balance on short time, secured by the endorsement of Maltby, Keys & Co., a mercantile house whose credit and character are unsurpassed in Cincinnati. The sum of twenty-one thousand dollars was then asked by Myers for these boats. The proof also shows that subsequent to this offer, repairs to the amount of four thousand dollars were placed on these boats by Myers. The fair cash value of the boats may therefore be safely set down at from eighteen to twenty thousand dollars, at the date of this alleged transfer.

3. They were sold to a young and inexperienced clerk, of limited means and no credit.

4. The sale was made upon a credit of two years, which is, of itself, unusual and extraordinary. Not a solitary witness, amid all the mass of testimony contained in this record, is enabled to cite a sale of any boat upon a credit anything like this.

5. Although the vendor was paying interest at the rate of ten per cent. upon many of his debts, as the judgments in this record show, he makes this sale on a credit of two years without interest or personal security, and without retaining a lien on the boat for the purchase money, or any part thereof.

6. The proof shows, that during the entire summer preceding this alleged sale, the price asked by the vendor for these boats was twenty thousand dollars. (*Record, p. 119, Jones' deposition.*)

7. Myers went down with the boat, continued in New Orleans as one of its active agents in obtaining freights, after the sale, and by his course on the arrival of said steamers in New Orleans during the winter, showed that he was still interested in them.

8. The transaction was secret, and the note of Williamson was not even received by Myers, but was left with Isham. To suppose that Myers, oppressed as he was with debt, after having declined an offer of eighteen thousand dollars in cash, or its equivalent, for these boats, should incur an additional expense of four thousand dollars in repairs, and then sell them secretly on a credit of two years, without interest, to a young, inexperienced clerk, without credit, and of inconsiderable means, would be to deny to him the power of ratiocination! What conceivable motive could have induced Myers to bring upon himself so ruinous a sacrifice? Justice to his creditors, not less than common prudence to himself, would seem to have dictated, that *had the sale been real*, some personal security should have been taken from Williamson, or at least a lien have been reserved upon the boats themselves. The record shows, however, that not only was this sale made to Williamson on a credit of two years, without security

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and without interest, and at a depreciated price, but that Myers himself went down on the boat, and continued, during the entire winter, in New Orleans, to give his personal attention and labor in securing both passengers and freight for the Yorktown. To increase, if possible, the improbability of anything like reality in this transfer, and to stamp it with its *true and fraudulent intent*, although the note of Williamson to Myers expresses, upon its face, that the existing debts against the steamer were to be paid by him, and when paid to be a credit on his note; yet the proof shows that no memorandum of these debts was retained, and Isham, with whom the note was left, and on whom devolved the alleged duty of making these credits, is unable to name any creditor save his own firm, or the amount of any debt due by said boat and paid by Williamson.

9. But strong and striking as all these badges of fraud are, they are fortified and sealed with the declaration of Myers, (made before the transfer,) of his *object, wishes, and design in making it*. The depositions of Ames (*Record*, p. 120) and Feakins (*Record*, p. 125) were read without exception. Feakins proves that the object of making this transfer by Myers, as detailed to him, was to enable him to run the boats and receive the profits, which he anticipated would enable him to pay off his debts. The boats were in Licking river, and Myers feared that if they were brought to the Cincinnati wharf, they would be immediately attached by his creditors. To obviate and to prevent this anticipated litigation, a *sham sale* was determined on by Myers—a conveyance to some true and tried friend, in whose integrity he could confide, and who would return the boats after the season was over. The witness states that Mrs. Myers desired the boats to be conveyed to him, but he declined. Myers having had, at a former period, O. C. Williamson in his service, and deeming that he was under obligation to him, thought he could safely entrust his interest to his keeping, and determined to

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make the transfer to him. This conversation between Myers and the witness took place before the transfer. After the conveyance, Myers informed the witness that he had made it to O. C. Williamson, and taken his note, which was locked up in Isham's safe, and *that at the end of the season* the note was to be delivered up, and the boat returned to him. This testimony was read without objection or exception on the part of the defendants, and as clearly establishes the fraud as the deposition of Myers himself. This witness is sustained by the deposition of Ames, to whom Myers disclosed his wish and desire to make over his boats temporarily to some friend, to shield them from apprehended attachments. Myers informs this witness of his confidence in O. C. Williamson, and details the reason why he thought a conveyance could be safely made to him.

These witnesses are sustained by the testimony of Judge Coffin, who stated that early in October, Myers, with one of the Ishams, (and he thinks the witness, J. G. Isham,) called on him for professional advice—that Myers stated to him that he was indebted to Isham, and he desired to have the use of the Yorktown for another season—that he feared his creditors would attach said boat, and to prevent this, and to enable him to pay off his debts by the anticipated profits of the boat during the ensuing season, he desired to place her in the hands of some friend who would keep her for him during the approaching season. Judge Coffin advised him to mortgage the boat, and Myers and Isham left the office, promising to return in a few days.

Williamson was at that time a clerk in this Isham's employment. A short time thereafter, this alleged transfer and bill of sale was executed by Myers to him, and his note was left by Myers with this *self-same* J. G. Isham.

The bill of sale *upon its face* shows that the steamer and barge were then in Licking river, and not at the Cincinnati wharf, and although Williamson was a clerk

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in Isham's store, he has been unable to show that he ever examined either the steamer or the barge, or that he had ever been upon either boat before his alleged purchase.

The circuit judge was unable to see anything in all these facts to throw the slightest suspicion on this sale, and although Myers may have designed a fraud on his creditors, yet there was no proof that Williamson participated in it.

With the highest respect for the learning of the court below, it is respectfully submitted, that this is the most lame and impotent of all the singular conclusions which characterize this very remarkable opinion.

What sort of proof would the circuit judge require? When an oppressed debtor contemplates a fraudulent disposition of his property, it would seem that very few persons would be called in to witness the fraud. Positive proof of a direct fraud is always difficult of access, owing to the secrecy in which all such combinations are planned. The circuit judge says: "*I am not satisfied that Williamson participated in the fraud. He perhaps knew of the purposes of Myers, but there is no sufficient evidence that he ever agreed to hold the boats for Myers.*"

We take issue with the learned judge, that any positive proof is necessary. Fraud may be presumed, if there be sufficient evidence of other facts, which authorize the inference of it. The assumption, by the court, that the fraudulent intention cannot be presumed, has long since been exploded.—(*Kendall vs. Hughes*, 7 B. Monroe, 370.)

It would seem that the facts and circumstances developed in this record have been sufficient to satisfy the circuit court of Myers' design and object to put his boats beyond the reach of his creditors. Now we assert, that it would have been utterly impossible for Myers to have carried out his purposes and motives of his fraudulent transfer without a full detail of his object to the confidential friend selected

by him as temporary vendee. If Williamson was selected by Myers as his fraudulent vendee, to receive the conveyance, it was absolutely essential that Myers should have disclosed to Williamson his purposes and designs, in order to have enabled him to carry out his wishes for the return of the boats. Williamson, therefore, with a full knowledge of Myers' purposes to place these boats out of the reach of his creditors, and with a full knowledge that they were to be delivered back to Myers in the spring, accepts the conveyance. Did not the acceptance of this voluntary conveyance by Williamson, with a full knowledge of Myers' purposes, constitute him, in the strongest sense, a *particeps fraudis*? Most clearly, as we can conclusively show. We admit the principle, in its broadest sense, that, to render a sale invalid, on the ground of fraud, the intent to defraud must exist with both the *vendor and vendee*. The vendor's object in selling must be to hinder, delay, and defraud his creditors, by placing his property beyond their reach. So, too, the vendee must accept the conveyance as a means of aiding the vendor in the accomplishment of his purpose.

Whenever, however, the fraudulent intent of the vendor is established, and a knowledge of *that intent* is brought home to the *vendee*, unless opposed by other circumstances, showing *fairness*, the vendee's acceptance of the conveyance, under such circumstances, is such evidence of his concurrence in that fraudulent *intent* as to make him *particeps fraudis*. The question of the fraudulent intent of the vendee may be inferred from the circumstances attending the transfer. If the vendee, under no necessity to purchase, but fully cognizant of the vendor's fraudulent purpose in making the sale, should make a purchase without taking any means to prevent the effectuation of the fraudulent vendor's object, he will always be regarded as having participated in the fraud. (*Brown vs. Foree*, 7 Ben. Monroe, 358.) And although the knowledge of a purchaser that the vendor of proper-

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ty intends to defraud his creditors, does *not in all cases, per se*, render the sale fraudulent, still it creates a presumption of a fraudulent participation on the part of the vendee, which must be repelled by other facts and circumstances showing a lawful inducement to the purchase. (*Kendall vs. Hughes*, 7 B. Monroe, 369.)

When, therefore, the circuit court admits the fraudulent intent of Myers in this sale, and Williamson's knowledge of it, no other legal deduction can be drawn, but that Williamson made the purchase to further and carry out the purposes of Myers. He must repel this presumption by circumstances tending to show that he had sufficient lawful inducement to make the purchase, or attempted to prevent the intended and unlawful consequences of the sale. It would be a difficult task for even the astute mind of the circuit judge, to extract from this voluminous record, one solitary fact tending to rebut, in the slightest degree, the presumed participation in the fraudulent transfer of these boats on the part of Williamson. He was not only informed by Myers of his object and motive in making the conveyance, but he was cognizant of, and participated in, the contrivance, by an acceptance of this bill of sale. Williamson has offered no plausible pretext for making the purchase, and, by his own showing, has paid not a solitary debt of Myers, pre-existing at the time of the transfer, unless it be the debt of Isham & Fisher. So far from repelling the legal inference of Williamson's participation in Myer's purposes, resulting from Williamson's knowledge of them, every fact and circumstance connected with the transaction, tend directly to show that Williamson's acceptance of the transfer, was done solely in aid of the settled plan of Myers, as admitted by himself, and disclosed by the testimony.

10. The deposition of Isham, although evidently taken to prove the fairness of this sale, conduces strongly to establish its fraudulent character. This

witness accompanied Myers to Judge Coffin's office, when he went to ascertain how these boats could be fraudulently conveyed. He was, therefore, fully acquainted with the proposed plan and purpose of Myers, in this temporary disposition of these boats. Williamson, to whom the transfer was made, was then a clerk in J. G. Isham's employment. The note of Williamson to Myers was left with this witness, and to him is confided the duty of crediting on this note all the pre-existing debts of the boats which Williamson had a right to pay off.

We have already commented on the singularity of the coincidence, that, had a real sale been contemplated, Myers should take Williamson's note at two years for fifteen thousand dollars, and allow him to pay off debts due by Myers, which were to constitute credits upon his note, and yet that none of these debts were scheduled and specified. Isham, however detailed a still more remarkable fact. He states that he was authorized verbally, by Myers, to credit on this note all these payments by Williamson. Accordingly this same witness, on the 18th of May, 1854, did, in Myers' absence, credit on this note the sum of \$13,654.34 of pre-existing debts of the Yorktown, as paid by Williamson, without any other proof whatever of the payment having been made, except Williamson's statement. This course of the witness was still more extraordinary, as he expressly states the amount of the debts which Williamson was to pay for Myers, and contained in the memorandum, amounted only to \$10,000, and yet, without consultation with Myers, and during his absence, without any knowledge, whatever, save Williamson's statement, he credits the note with \$13,654.34, as made on the 18th of May, 1854.

The witness refused to swear, that the endorsement of this credit was made on the 18th of May, 1854. He was unable to give any satisfactory reason why he fixed on that day. He was unwilling to swear, that the credit was not endorsed by him in

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June, and if so, it was done after the bringing of this suit. This bill was filed on the third of June, 1854, and this witness was unwilling to swear whether an endorsement of \$13,654.35, in his own handwriting, dated 18th of May, 1854, was made in June or not.

Under such circumstances, the credibility of the witness seems severely tested. He does not present himself certainly under the most favorable circumstances for credit. His deposition, were there no other proof, would be conclusive of the fraud. It, unfortunately for Williamson, proves too much.

This witness states, that he was aware before this transfer, that Myers had become bound to J Dickson and T. S. Dugan & Co. to bring up a certain amount of molasses at a rate greatly below the usual freight. This contract with Myers, had not been fulfilled on the 18th October, 1853. If his sale to Williamson was valid, he placed it out of his power to comply, and Dickson & Dugan would have a right to look to Myers for damages. Under what obligation was Williamson, if he had made an honest purchase of these boats, to fulfill this contract of Myers? Why should he bring up this molasses except on his own account? If the sale was *bona fide*, what had Williamson to do with Myers' existing contract for freight? Upon what ground did Williamson undertake to fulfil these contracts of Myers to Dickson, Dugan & Co., and charge to Myers the difference in price between the sum for which Myers had undertaken to bring up the molasses, and the price which Williamson chose to charge? The statement of Isham proves that there was no agreement between Myers & Williamson at the time of this transfer, that the unliquidated liability of Myers to Dickson & Dugan for a violation of his freight contracts with them was estimated in the list of debts which Williamson was authorized to pay off. Williamson has offered no proof showing that Myers consented to his performance of his liability to Dickson & Dugan. On what basis Williamson brought up the molasses for

Dickson & Dugan, and was authorized to charge the difference in the freight bill to Myers, he has not attempted to show. It is still more extraordinary, that Isham should have recognized this credit in Myers' absence, without any consultation with him, and without any proof that the services had been performed by Williamson.

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But again, we ask the especial attention of the court to the alleged memorandum of payments made by Williamson for Myers, and audited by the witness Isham on the \$15,000 note.

Many of these payments are for liabilities created after the transfer of the boats to Williamson. On what pretence was Myers to be bound for the debts of the Yorktown after a valid sale to Williamson.

It will be perceived that many of those having claims against the Yorktown prior to the 18th October, 1854, have interpleaded on this suit, and seek a lien against the boat for an enforcement of their claims. Such a course on their part establishes beyond doubt, that they were kept in utter ignorance of the transfer to Williamson, and that they did not assent to it. It establishes the further fact, that while debts created by Myers for supplies to the boat, prior to his transfer, and which Isham proves were assumed by Williamson, have been unpaid by him, yet that he has received credit on his note for an alleged payment of unliquidated damages on the part of Myers to Dugan & Dickson, and which, so far as the proof goes, was made by Williamson, without the knowledge or consent of Myers. The alleged conversation of Myers and Williamson, as detailed by Isham after the transfer, is wholly inconsistent with a valid sale. It is too strong a tax on human credulity to ask us to believe, that if Williamson had purchased this boat and barge in good faith, Myers would ask Williamson to allow him to take the boats back in the spring. It is very natural to conceive, however, that in a fictitious transfer, such a conversation should be brought about in the presence of a wit-

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ness, who, in the event of an attempt by creditors to set aside the sale, should be ready to prove that it was *bona fide* and genuine.

Finally, we submit that the continued connection of Myers with the boat, from the time of the alleged transfer to the period of her being laid up, is wholly inconsistent with the supposition that the sale was made in good faith. During the whole winter he seems to have been actively engaged in New Orleans, in obtaining passengers and freight for the boat. It is in proof that on the 23d May, 1854, Samuel Williamson telegraphed to Myers "that the Yorktown was laid up—nothing done."

What was the meaning of this dispatch? It certainly had a meaning, and its explanation is given in Myers' deposition. If that explanation be untrue, why has not O. C. Williamson explained it by the deposition of Samuel Williamson.

In a sale surrounded and marked by so many striking and significant badges of fraud as characterize this, is it not amazing that Samuel Williamson should not have been called on for some explanation of the cause and meaning of this dispatch? Is it an improper or illegal inference, that from his failure to do so, we have a right to presume it was incapable of any explanation favorable to his interest? This record presents a strong case, as we confidently submit, of an unmitigated fraud.

Upon the part of Myers, the evidence conduces to show that he had no intention ultimately of defrauding his creditors. His only motive in the transfer, seems to have been to run his boat for another season, and from his anticipated profits, to pay his debts. His fear of being thwarted in this purpose, from attaching creditors, induced him most imprudently, illegally and unwisely, to execute this fictitious transfer to Williamson. The evidence clearly shows that he had the fullest confidence in Williamson and Isham. How this confidence has been valued, this controversy sufficiently attests. Williamson has play-

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ed the game boldly ; and so far as poor Myers is concerned, but *too successfully*. With all his cool and adroit determination as against Myers' creditors, to appropriate these boats to his own use, his effort has signally failed. Fraud, in its darkest aspect, with or without the disposition of Myers & Halderman, stands out in bold relief, from the inception of this scheme to its termination, and we confidently submit, that no candid or impartial mind can examine this record without the clearest conviction, that the plaintiffs below were fully entitled to the relief sought in their petition.

A reversal is respectfully and confidently asked for at the hands of this court.

M. C. Johnson on the same side—

1. The question is as to the competency of Myers and wife.

Their competency is contended for on the ground of the equipoise of interest.

If plaintiffs succeed the steamboat and barge will be used in paying Myers' debt. But their success will destroy the validity of the note for \$15,000. The interest is here balanced, as shown by the authorities cited by the opposite side, of 2 *Phillips' evidence*.

Williamson, however, has advanced money to Myers, as admitted by Myers, to the amount of \$450—see his deposition ; as contended by Williamson, \$850, but of this there is no proof. This money was advanced or loaned when there was nothing due, and could be recovered back ; but even if it could not the proof clearly shows that the steamboat had deteriorated more than \$2,000 between the time of the bill of sale and the attachment of it in this suit, still leaving the balance of interest against the plaintiffs—see deposition of W. H. Pierce.

Williamson also paid debts upon the boat, and against Myers, for some \$12,000. Myers is still liable to him for these debts—see the case of *Planters Bank of Tennessee vs. Baker*, decided at the last term,

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where the court, in the case of a fraudulent conveyance, allowed the fraudulent vendee the debts of the vendor, which he had paid as the consideration of the fraudulent conveyance. These debts are improperly credited on the note. By Williamson's answer it was not to be done until two years, when the note was due. The order of Myers, if genuine, is one of the strongest evidences of fraud. The order is to credit *any bill* that Williamson *may render*. It is not proved that this was done until after this suit was commenced. After suit commenced one party cannot, by his own act, disqualify a witness—for instance, Williamson could not, by releasing Myers from these debts, and thereby destroying the balance of interest, disqualify him; nor could he, by causing these debts to be entered as credits on this note, effect the same end, even if so entering them would release him, which it would not. The liability of a fraudulent vendor to his vendee, for debts paid by the vendee, is not opposed to any Kentucky decision, and is thoroughly sustained by the case of the Planters Bank.

2. The fraud of the sale.

If Myers' deposition be sustained by the court there is no question as to the fraud.

Mr. Stevenson's brief of the evidence omits several depositions which I consider quite important, and will not dispense with reading the record—Jason Gowdy, John C. Riley, Thomas Feakins, Danl. Ames, H. A. Jones, R. M. Wade, J. J. Warman.

The circumstances proving fraud are numerous. Myers sold a boat, which, whatever differences of opinion may exist as to its value, he, Myers, evidently valued at \$20,000 at least, for \$15,000, on two years' credit, equal, at Cincinnati interest, to only about \$12,000, to a youth without means, and with no earthly security, who was a clerk in the store of his principal creditor, who insisted, (as stated by himself,) on a change in the management of the boat with a view to his own security, and who keeps the

note and holds it to this day. Such a sale, (as a genuine sale,) has no parallel.

It is exactly consonant with such a transfer as Myers wished to make and proposed to make. Williamson was a steamboat clerk. His brother was a steamboat pilot, who had been in the employ of Myers for some years, and was engaged for the following season. He was approved by J. G. Isham, the principal creditor of Myers on the boat, and who told Myers "*that the boat would have to be put in other hands for management.*" Williamson was to be liberally paid; his brother made captain; he was to be in no danger; the note he gave was not to be delivered to Myers but kept by Isham, and could be given back to him if accidents happened. He did not, in the note, assume the debts of the boat, and substantially he came under no responsibility. The boat was insured for Isham's benefit.

It has all the ear-marks of fraud—

1. It is a sale when Myers evidently did not wish to sell.

2. Myers was embarrassed, and urged by Isham to let the boat go into other hands for management.

3. Myers and Isham go to a lawyer, Mr. Coffin, to consult about the best mode to make a sham sale.

4. The price was inadequate—see depositions of Riley and others—also, the price at which the boat sold by the sheriff, after it had been run a season—\$14,500—when it was worth some three or four thousand dollars less.

5. The terms of sale, length of credit, and want of security, and small means of Williamson, were utterly absurd as a real *bona fide* and sane transaction.

6. The order given by Myers to Williamson, directing J. G. Isham "to credit on Williamson's note you (Isham) hold for me, the amounts *he may render you a bill* for debts paid, &c.," placing it wholly in Williamson's power to render any bill he chose, and obtain a credit for it, shows either the order was

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fraudulently obtained, if the transaction was *bona fide*, or that the whole thing was a mere sham, and the order given to protect Williamson in regard to the note.

7. The conduct of Isham in giving a receipt on the note, after a difficulty had arisen between Myers and Williamson, and leaving all vouchers and evidences of debt in Williamson's hands, shows a combination between Isham and Williamson.

8. Isham says, in his deposition, that Williamson, in the spring, wished him to enter a credit on the note for debts he had paid off, but he (Isham) refused without Myers' order; that order is dated February 17, 1854, and was then in Williamson's hands!

9. The business relations of Isham and Williamson; Isham's going with Myers to consult Coffin, the lawyer, about a sham sale; Isham's insisting on the change of hands of the boat for *management*; his retaining possession of the note; his manner of entering credits, without retaining even a list of them, or vouchers for them, all show a combination between Isham and Williamson in the making of the sham sale, and in the attempt to convert it into a real sale.

10. The evidences brought forward, of its being a genuine sale, do not, in fact, militate against its being a mere sham. Of course the sale was to be publicly spoken of as a genuine sale. Even when the contract is made it is usual for the parties to agree to *speak, even among themselves*, at that time, as if it was a real sale. The understandings are all previous. These understandings are not generally in express terms, but in such general terms as, "I will bring you out," or "I depend on your friendship," "I have confidence you will do right," &c.

11. There is no doubt that Myers understood that it was a sham. His unwillingness to sell; his valuation of the boat; the price given, so inadequate to his ideas; the terms of credit, so unsuited to his condition; the interest he afterwards manifested in the success of the boat, all plainly prove it. Neither is

there a doubt that Williamson knew that Myers so understood the sale, even if we should come to the conclusion that he designed, from the first, to hold to his purchase as genuine.

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In regard to the credit due to Myers' statement.—Although legally a fraud, his conduct, with the motives that actuated him, was not morally wrong. He wished to pay *all* his creditors; he could only do it by running the boat the next boating season. Had his arrangements been carried out he could have paid all or nearly all; as it is he is, in any event, insolvent. And that fact, independent of all technical rules, makes him actually disinterested. It is now really a question with others, in which his insolvency deprives him of pecuniary interest.

Menzies & Spilman for appellee—

1. The only witness who proves that there was an understanding that the boat should revert to Myers, after the expiration of the season, is Myers himself, whose deposition was excluded, and we have no doubt rightfully, as abundantly shown by the authorities cited by the circuit court; and although it is true, as stated by him, that there is some conflict of authorities upon the subject, we cannot doubt this court will give the greater weight to that current of decisions which is most consonant with natural equity, and in so doing follow *our own* adjudications. We shall therefore consider the evidence of Myers (as well as that of his wife, and of Walker and Halderman, joint debtors with Myers in the judgments sought to be satisfied out of the sale of these boats,) out of the question, which takes away all the direct evidence on behalf of the plaintiffs upon this branch of the subject, and turns us over to the *circumstantial* department. But we must not fail to add, that while there is an entire absence of competent evidence to sustain the plaintiffs' charges, there is positive proof to the contrary in the deposition of J. G. Isham, of Capt. Hawley, of S. Williamson.

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2. But we are pointed with great emphasis, and characteristic confidence of language and manner, by appellants' counsel, to the alleged facts that the boats were sold *too low*, on unprecedentedly long credits, without any *cash payment*, and *without security*.—The first of these positions we confidently deny.—The others are easily explained. There are some witnesses who think the boat and barge were worth \$18,000 to \$20,000, but the weight of evidence is that they were worth *less* than \$15,000. Capt. Hawley thought them high at that price. (*See his deposition*, p. 192.) All the following witnesses—men of large experience and good judgment—put the value below \$15,000—Pierce, inspector, Wm. H. Pierce, Spencer, Searles, Withenburg, and Fisher.

Next, as to the credit. It is true the sale was nominally on a credit of two years, but the boat was under liens to the amount of \$8,000 or \$9,000 (besides mortgages to secure the fulfillment of large contracts for carrying freight,) which were assumed by Williamson, and, *to save the boat*, must of necessity be paid promptly, which was equivalent to a cash payment to that amount; and the individual debts of Myers, assumed by Williamson in the purchase, amounted to almost the entire balance of the purchase money. And as it would take Williamson some time to arrange these, the balance coming to Myers could not be *ascertained* until these debts were settled; hence the nominal credit was put at two years, as by that time it was supposed the *balance* could be ascertained.

As to the failure to take security by reserving a lien on the boat, or other mortgage, two reasons can be assigned for it. First, Myers was well acquainted with Williamson, and had great confidence in his integrity and capacity, and was willing to trust him. In the second place, we agree with the counsel for appellants, whatever may have been Williamson's motive in the transaction, Myers' motive was fraudulent. His object was *to hide from his creditors*.—

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Had he, therefore, placed on record a mortgage on the boat, or anything else, it would have been a finger board to point his creditors just where he did not wish them to look. His object was to keep his effects in as *intangible* a form as possible. And he preferred trusting Williamson without security, to incurring the hazard of a suit by his creditors to subject his claim on Williamson to their debts.

3. But the interest which Myers continued to take in the success of the boat after the transfer, and some slight circumstances *tending* to show control on his part, are paraded with considerable pomp, and great zeal, as unmistakable evidences of ownership.

The principal circumstance tending to prove control of the boat by Myers, after the transfer, was the renting by him of the bar of the boat for that season, and receiving the rent. But it turns out on cross-examination, that this renting was done *before the transfer*, and for the whole season; and of course Williamson took the boat subject to it. And this, and perhaps some other similar drawbacks, may account to plaintiffs' attorney for the supposed *low price* at which the boat was purchased. Some fugitive remarks of Williamson about consulting Myers about an old carpet, the object of which we are not informed, and the giving away by Myers of an old cable box, which may or may not have been known to Williamson, or assented to by him as a matter of no consequence, constitute the *foundation* of this branch of plaintiffs' argument.

There is no difficulty in accounting for Myers' interest in the success of the boat. He had a pecuniary interest in its success. Not, however, as the owner of the boat, but its success was *his security*.—It was the security which he had chosen to trust, and of course he watched it with much anxiety, and did all he could to secure both freight and passengers for the boat. One-half of the mental force and discrimination expended by the learned counsel in endeavoring to torture these acts into badges of *fraud*,

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would have enabled him to see them in their true light, and reconcile them with honesty of purpose.

We cannot doubt the correctness of the judgment of the circuit court.

George Robertson on same side—

A few facts and ideas, in addition to those suggested in the brief of Messrs. Spilman & Menzies, will constitute this hurried supplement.

1. The competency of depositions rejected by the circuit judge, is the first matter material for consideration.

Walker & Haldeman, who are sureties for the debt sued for, are undoubtedly interested in the success of the complainants; for, though they speak of an indemnity, yet the court knows nothing of its sufficiency, and even were its adequacy and certainty for ultimate security established, the direct and immediate liability is a legal interest sufficient to disqualify them as witnesses for exonerating themselves from it. Jonathan Myers, the vendor, is equally incompetent.

The old doctrine that a witness was incompetent to prove his own fraud, is properly overruled. But, when it is his interest to set aside his own contract by testifying that it was fraudulent, the presumed bias of that interest will, unquestionably, close his mouth on that subject. And, in most cases in which a witness had transferred his property in the form of a sale, and received any value from the vendee, it is his interest that his creditor should subject the property in satisfaction of his debt—because, thereby the vendor will have been paid twice for the same property—once by his vendee, and again by his creditor. (*Paul vs. Rogers*, 5 *Monroe*, 167; *Bailey vs. Foster*, 9 *Pickering*, 139; *Bland vs. Owsley*, *New R. English*.)

It is conclusively settled that a fraudulent vendor could not, by any form of suit, be compelled to make restitution of the sum he had received from his ven-

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dee on a contract for defrauding his creditors. In such fraudulent contracts the law will not imply either warranty of title or an assumpsit to pay back. If there be even an express warranty, it will not be broken by a recovery of the property by a defrauded creditor. (*Ragland vs. Wickware*, 4 J. J. Mar. 530.) And, besides, no express executory stipulation, which is an element of such a contract, or is superinduced by it, will be enforced by the law, whose wholesome maxim, for the prevention of such fraud, is, *in pari delicto potior est conditio defendentis*. No doctrine is now more firmly established here than that which withholds, from each party to such a contract, all remedy for enforcing the fulfillment of it. Anciently this doctrine was not understood or settled in England, where, in the case of *Hawes vs. Leader*, (Cro. Jas.) the court sustained an action of covenant made for defrauding creditors; and in *7th and 16th Johnson's New York Reports*, and in *1st Blackford*, 263, that *dictum* was obsequiously and inconsiderately followed. The only reason for such decisions, was that the statute provided that such a contract was void only as to the creditors, and the court, *therefore*, considered it as binding between the parties. In one sense it is so binding—that is, the law will not help either party to avoid it. But it does not follow that it should help either of them to enforce it; and, by the wise application of the foregoing maxim of policy, it will refuse to aid either of them in enforcing it. And we need go no further than the cases of *Surlot vs. Beddo*, 3 Mon., 109; *Norris vs. Norris*, 9 Dana; *Balt vs. Rogers*, 3 Paige's R.; *Herrick vs. Grow*, 5 Wend., 579; *Bailey vs. Foster*, 9 Pickering, 139, to prove that this is modern doctrine in America. Indeed it is now the settled doctrine in England as well as here. In a note in *Phillips on Ev.*, (part 1, p. 122,) the author, after analyzing cases, concludes as follows—"that the vendor is a competent witness for his vendee, but not so for his levying creditor, who offers him on the assumed ground of fraud." This doctrine is in no de-

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gree shaken, or even questioned, in the cases of *Baglor vs. Smither's heirs*, 1 *Littell*, 111, and *Ragland vs. Wickware*, 4 *J. J. Marshall*, 530, the principle of each of which cases is misconceived by Mr. Stevenson in his printed brief. In the case in *Littell*, a party to a contract charged to be fraudulent against creditors, was admitted to be competent to prove, *not that the contract was fraudulent*, but that it was *not* fraudulent; and the following extracts from the opinion of the court show why he was adjudged competent: "An attempt was made on the trial to prove a fraudulent and collusive combination between the ancestor of the heirs (plaintiffs) and Shirley (the witness) to defraud the creditors of Shirley; and it may be contended that Shirley was an incompetent witness to *disprove* the alleged fraud, and, on that ground, ought to have been rejected. But it may be replied, that the supposed argument assumes an objection which goes properly to the credit, and not to the competency of Shirley." And why? The court had just before assigned the reason in the following language: "He cannot be said to have such an interest in the support of the right of the heirs as to render him incompetent on that ground; for, by proving the property of the girl (slave) to be in the heirs, he would subject himself again for the amount for which she had been sold (for his benefit), without conferring on himself any right to be restored to her possession."

In the case in 4th *J. J. Marshall*, a slave, Ned, having been levied on as the property of Samuel Wickware, the said Wickware, being offered as a witness to prove the *bona fides* of a transfer of Ned to his brother, E. Wickware, the plaintiff in the action for recovering him from the purchaser under the levy, was adjudged to be competent to prove that said transfer was a *bona fide* sale, and was *not* a fraud on his creditors; and the chief reason assigned, was that Samuel's warranty would not be broken by the recovery of the slave on the ground of fraud, because that would only prove that his title was, as warrant-

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ed, good, and that the fraud, in which the *plaintiffs had participated*, was the only ground of the recovery.

In the case of *Surlot vs. Beddo*, a slave of Beddo's having been fraudulently transferred by him to Surlot, Shanks, as creditor of Beddo, levied his execution on the slave and sold it for \$500; and Surlot, having previously become Beddo's surety in a replevin bond to Shanks, paid, on that bond, \$209 as the balance unpaid by said sale. To recover the \$209, and the \$500 for which the slave was sold, Surlot sued Beddo in *assumpsit*, and Beddo having pleaded that the transfer of the slave to Surlot was made to defraud Shanks, the jury, *under the instructions of the court*, found against Surlot as to the \$500, and gave him only the \$209. On an appeal, *by Surlot*, to the appellate court, that verdict was sustained on the ground that, *by the fraud, Surlot was precluded from recovering on Beddo's warranty*. Beddo not objecting to the verdict, the court said nothing, of course, about the \$209 found against him. And, had Beddo sought to reverse the judgment for that sum, he could not have done it for fraud in the negro contract, because *it was not paid to his use under that contract, nor as any part of the consideration of it*. And Mr. Stevenson is grossly mistaken when he says that "Surlot was allowed (by this court) to recover back all the money advanced by him for Beddo *under the fraudulent arrangement made between them to defeat Beddo's creditors*." 1st, because, as Beddo acquiesced in the verdict, this court did not, and could not, adjudicate on it; and 2d, because, had he complained, the court could not have avoided it for fraud, as that money was *not paid "under (or in consideration of) the fraudulent arrangement."* He is equally mistaken when he places Shirley in the attitude of a witness introduced *by Baylor* "to prove the alleged fraud." He was introduced *by Smither's heirs to prove that there was no fraud*; and the court having decided that he was competent for that purpose—also decided that, *on cross-examination*, he should be required to

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answer questions *conducting to discredit him*, by showing fraud.

None of the Kentucky cases therefore, tend, in any way, to show that Myers is a competent witness for the plaintiffs to prove that his sale of the boat was fraudulent. And the foreign cases referred to for that purpose by Mr. Stevenson, go on the false and exploded idea that, if that contract should be set aside for the imputed fraud, Williamson could recover on Myers' warranty, or for the money advanced by him for the boat, *which principle, policy and conclusive authority all disprove*. It is, we think, clear on all these grounds, that a vendor, who has received anything under the sale, is incompetent, as a witness for his creditor, to prove that the sale was a fraud on that creditor. Wherefore, Myers was incompetent, and consequently his wife, who, if competent, proves nothing.

Without Myers' deposition there is no plausible pretence for urging a reversal of the decree. And even, if it were admitted as evidence, the case would, as we would insist, be for our client—for not only did the peculiar temptation to falsify destroy the credibility of Myers, but he is also shaken by the improbability and inconsistencies of his whole story, and is overwhelmed by the testimony of S. Williamson, Hawley, Isham, and others.

Is it credible that Williamson, comfortable at home, in his own house and with his own family, and receiving a salary of \$1,000 a year for the light service of a clerk, would have surrendered all this domestic peace and security, and encountered the perils, privations and toils of the steamboat, on a promise *indefinitely* to pay him *a better salary*? And is it not very incredible that, on such terms, he would also have undertaken to pay a heavy and unascertained debt which was then due, and *which bound the boat*, and moreover to finish her necessary repairs, and provide the means of equipping and supplying her for service? And the more especially, *when all this*

was to be done and his engagement cease in about six months? And when, too, the boat seems to have made but little or no profit during the three preceding seasons of running, and her owner (and his employer) was insolvent? Yet all this Myers tries to prove. Falsehood is stamped on the face of his deposition, especially when his motives are considered. Besides, is it not strange (if he tells the truth,) that Williamson, after paying all the debts, had no evidence to show what he was entitled to, while Myers is entitled to the boat, and the excess of profits over the amount of those debts? And especially when, had the boat been lost, by collision or otherwise, or had she made no profits, Myers might, and doubtless would, have claimed the \$15,000, and no other contract than that shown by the written memorial could have been proved by witnesses, or would have been admitted by Myers, even under oath.

But there is abundant testimony in corroboration of the written contract. S. Williamson testifies that both parties, more than once, recited their contract to him substantially as stated in the bill of sale; and that, though one of them was his brother, and the other his friend and employer, neither of them ever intimated anything else; but, on the contrary, Myers told him, "that he had nothing to do with the boat, but that he had parted with all his interest in her to O. C. Williamson, who was, therefore, responsible for the debts." And so he would have continued, even yet, to say, if the boat had not, under skillful management, been very lucky. Hawley testifies that, just before the sale to Williamson, Myers proposed to sell her to him (the witness) for \$20,000; that, on his telling Myers that the price was extravagant, Myers asked what he thought it was worth, and *what he would give him for it*—to which he replied that he did not want it; but that, if he did, he would not give more than \$15,000 for it; that, two or three days afterwards, "Williamson asked him (Hawley) *if he would go in with him and have half the Yorktown and barge at \$15,000;*" that he replied he would not, but

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told him that, if he (Williamson) should buy, "*he would step in and help him to money;*" that *after this conversation*, Myers told him that he had *sold* the boat to Williamson; and again, "*that it was a bona fide sale.*" Isham testifies that Dickson had a mortgage on the boat for securing the performance of a promise, on the advance of \$1,000, to freight molasses from New Orleans at \$1 25 a barrel, (which was greatly below the customary price,) and that Dugan & Co., for the like advance, held a similar lien; and these contracts had not been performed by Myers when he sold the boat to Williamson. He also testifies that, when Myers sold the boat, he owed his firm more than \$6,000 for stores and money advanced for *the preceding three years*; that Myers, on being urged to pay, *offered to sell*, and *did sell the boat to Williamson for \$15,000*, as stated in the bill of sale; that Williamson was to pay all the debts then due on the boat, which were estimated at \$10,000; and that the note for the \$15,000 was deposited with him for the purpose of his endorsing on it the payments of debts by Williamson as he should make them; and that, in May, 1854, Williamson exhibited to him vouchers showing that he had paid debts and made advances to Myers exceeding \$13,000, and that he endorsed them on the note on the 18th of May, 1854, *in pursuance of a written order from Myers*; that *Williamson hesitated to buy the boats until he and his partner promised to indulge him for their debt against it, and to furnish supplies, on credit, for finishing its repairs*, and "*help him start the boat out.*" He also testifies that the sale, as assumed by both parties, was *bona fide*—that Williamson was asked by Myers "*if he would start the boat and agree to give her back, which he most particularly refused to do*, since he did not like to assume all the risk of accidents, and doing a prosperous business, *without a prospect of the profits arising out of the same.*"

The foregoing facts, if not fortified, *as they are*, by many minuter circumstances, ought to be deemed

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sufficient, especially when combined with the written memorial, to repel the imputation of fraud, even if the inconsistent, and interested, and discredited, deposition of Myers could be read as evidence. But without that deposition, it is difficult to imagine how the written contract and the corroborating facts proved by our witnesses, can be adjudged as so far overruled as to justify a reversal, and authorize a nullification of the contract as fraudulent, and thus, probably, ruin Williamson. The appellants, however, try that forlorn hope, and array, for that purpose, several little circumstances, the most material of which we will briefly notice, by condensing, into one, such of them as, in different forms, present only the same idea in substance.

1. Myers' condition. This, in fact, shows a strong motive for selling. He was insolvent, without credit—could not even pay for the repairs of the boat—owed heavy debts which operated as a lien—could not hope to start her into service—knew that she must soon be attached, and probably sacrificed without the possibility of his getting, *for his own use*, any portion of the proceeds—and he had failed to sell, though he tried, to any other person on better terms—under these circumstances, was not the sale, as made, prudent?—was it not the best he could probably have done?

2. The price was inadequate and the credit too long. Considering the age and condition of the boat, and the testimony of Hawley, Isham, and the two Pierces,—valuing the boat in November, 1853, *after she was sold and repaired*, at \$10,000,—Withenburgh, and others, the court will conclude that \$15,000 was, at least, a fair and reasonable price; and Mr. Stevenson is altogether mistaken in assuming that the sale was on a credit of two years; for more than \$12,000 were, at the time of the sale, due on the boat, and Williamson was bound to pay all of it at once, or, by his credit, to procure partial indulgence, and pay interest on it. More than two-thirds of the

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price was, therefore, cash in hand ; and in fact nearly \$14,000, of the \$15,000, were paid within less than 7 months. Who else would have given \$15,000, and have paid nearly all of it, as he did, down ?

3. Myers went with the boat and attended to her interests after the sale. These facts are both exaggerated and distorted in the printed brief. Myers lived in Orleans, and on the first trip of the boat he went home on her, *and never went on her back again.*—As S. Williamson proves, Myers took no sort of control of the boat, but, as was natural to any former owner and who was interested in immediate profits for paying his debts, he occasionally suggested advice, and may have manifested concern about her safety and her freight. This is all—and properly considered, it does not weigh as much as a feather as a badge of fraud.

4. The transaction was secret—no security taken—Williamson was poor, and Isham kept the note. This is all explicable without a vestige of collusion. The contract was in writing, and disinterested witnesses were privy to it, and both parties publicly and repeatedly stated it just as it was, and the possession and control were forthwith changed. No security, better than the existing liens, was necessary—what better could have been given ? If Williamson failed to pay any debt to which she was subject, the creditor could sell the boat. This was the best possible assurance to Myers for all except a small balance of the \$15,000, and for that little balance, Williamson himself, the boat, and Myers' vigilant anticipation of advances, as illustrated by the account, afforded ample security.

5. Myers contemplated a fraud. That he might have made, if he could, *with the proper man*, a collusive arrangement, we shall not deny. But failing in this, and, at last, compelled to act without longer delay, he sold, and on advantageous terms under all the circumstances. And the testimony of Hawley and Isham would, alone, be sufficient to show

that he intended and understood the contract to be as written. There is no proof, therefore, that *in that contract*, he contemplated a fraud; or that, if he did, Williamson fraudulently participated in that purpose, or was even aware of it.

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There is much more ground for charging the plaintiffs with fraud. Under our law they might have attached the boat as soon as the transfer was made, if, as they charge, it was a fraud on them as creditors of Myers. But they cunningly seemed asleep and acquiescent in the sale, until Williamson had, by paying the debts of the boat, relieved her of all incumbrance, and *as soon as that was done*, they attach her, and endeavor to make him pay their debt. Had they attached her before these debts had been paid, then, even had he established the imputed fraud, the sale of her would not have done more than satisfy liens and priorities, and the plaintiffs could have made nothing but the fun of paying costs. Why did they thus lie by? Why did they not proceed before Williamson had made any payment, and thereby relieve him from the loss of nearly \$14,000, and also his boat, which they are striving to take from him? There can be but one reason, and that shows a rapacious and fraudulent design in the plaintiffs in the prosecution of this suit. And to consummate their fraudulent purpose, they have conspired with Myers, at whose instance and for whose benefit this suit was probably brought, and, though he is made a defendant, and in his answer, as a cross bill, prays for a vacation of the bill of sale and restoration of the boat, they try to make him a witness in his own case, and the only direct and important witness in this case.

The fact that Myers is such a party would, alone, render him incompetent as a witness against his bill of sale.

We conclude by repeating, that even with Myers' deposition, the decree ought to be affirmed; and that, without it, the court can surely have no serious difficulty.

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J. Harlan, on the same side—

The depositions of Myers and wife, and of Walker and Haldeman, were taken by the plaintiffs, and whether they are competent witnesses for them presents the first question for the decision of the court.

1. And first as to Walker and Haldeman.

The object of the present suit is to *subject* the boat and barge to sale, and apply the proceeds to the payment of the judgments rendered in favor of the plaintiffs against Myers, Haldeman, and Walker.—If the plaintiffs succeed, by the swearing of Haldeman and Walker, their own property will be relieved to the extent of the net proceeds of the sale of the boat and barge. The interest of the witnesses is *direct*, and consequently they are incompetent to testify.

2. As respects the competency of Myers and his wife.

The first objection I shall urge against the competency of Jonathan Myers as a witness is, he is a party to the record.

Greenleaf (*volume 1, page 329*,) says: "First in regard to parties, the general rule of the common law is that a party to the record, in a civil suit, *cannot be a witness*, either for himself or for a co-sutor in the cause. This rule of the common law is founded not solely in the consideration of interest but partly also in general expediency of avoiding the multiplication of temptations to perjury." (*Lampton vs. Lampton's ex'ors*, 6 *Monroe*, 617; *Higdon's heirs vs. Higdon's devisees*, 6 *J. J. Marshall*, 53.)

In chancery a party to a suit may be a witness for or against other parties in the same suit, *if he have no interest* in the question to which he deposes.—(*Warren vs. Sproule*, 2 *Marshall*, 539; *Sharp vs. Morrow*, 6 *Monroe*, 304; *Oldham vs. Jones*, 5 *B. Monroe*, 460; *Craddock vs. Thornton*, 11 *B. Monroe*, 100.)

The second objection against the competency of Myers as a witness is, he is directly interested in the matter about which he deposes.

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In *Phillips on Evidence*, vol. 1, page 64, it is said, "in an action of trespass against a sheriff, when the question was whether goods which had been taken by him in execution in a suit against A B, belonging to A B or to the plaintiff, A B was not allowed to be a witness for the defendant to prove the goods his property, for the effect of his evidence would be to pay his own debt with the plaintiff's goods." (See 2d volume *Cowen & Hill's notes Phillips on Evidence*, p. 120, notes 111.)

The question presents a case of palpable interest, but it will be argued that the interest of the witness may be equalized by showing that as vendor of the property he would be liable to his vendee for its value. The answer to that position is, the vendee could not recover on the warranty, because in order to succeed, the record of the recovery would have to be produced, and that would show that the sale was fraudulent, which would be tantamount to a defeat, for it is an established principle that courts will not enforce an executory contract, founded in fraud, on the rights of others, or a breach of public policy, but leave the parties where they are. (*Bolt vs. Rogers*, 3 Paige, 154; *Herrick vs. Grow*, 5 Wendell, 579; *Sur-lot vs. Beddo*, 3 Monroe, 109.)

The effect in this case shows the impolicy of permitting a man situated as Myers to be a witness. In 1853 he was indebted to the plaintiffs about \$20,000, and to sundry other persons, who were creditors of the boats, amounting, as he admits, to about \$8,000. He sold and delivered the boat and barge to Williamson, who paid about \$13,000 of debts against Myers, contracted whilst he was in charge of them, and against which the creditors held special liens. Myers then caused a suit to be instituted in this state, against the boat and barge, to have them sold to pay the debts of the plaintiffs, and he is introduced as a witness to sustain their claim, and on his examination he swears he made a fictitious sale of the boat and barge to Williamson for the purpose

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of hindering and delaying his creditors—and such as the law denounces fraudulent. If he were a competent witness his conduct throughout divests him of any credit. He shows he is a *swift* and *willing* witness on the side of the plaintiffs. There is nothing which shows fairness and impartiality.

The rejection of the deposition of Jonathan Myers carries with it that of his wife.

The evidence of Myers and wife, and of Halde-
man and Walker, being out of the record, is there any evidence left upon which a court could base a reasonable ground for suspicion of fraud, and subject the proceeds of the boat and barge to the payment of plaintiffs' judgments?

One of the alleged evidences of fraud is the price Williamson agreed to pay for the boat and barge.—The proof taken by Williamson upon the question of value is as follows :

John G. Isham (*page 201.*) says, "I think \$15,000 a fair price for the steamer Yorktown, No. 2, and barge No. 2, at the time she was sold."

Joseph Pierce (*page 222.*) estimated the Yorktown at \$10,000, and the barge at \$1,500, in November, 1853.

William H. Pierce (*page 224.*) valued the Yorktown 2d, in November, 1853, at \$10,000; reported unseaworthy in June, 1854, and valued her in July, 1854, at \$8,000.

W. W. Withenburg (*page 228.*) is a steamboat captain; went on board in October, 1853, to examine the boat with the view of purchasing it, and came to the conclusion it was worth \$12,000; would not have been willing to have purchased the boat at \$15,000 with an overhanging debt of \$11,000 on it.

James T. Fisher (*page 280.*) estimates the boat at from \$12,000 to \$15,000.

Henry E. Spencer, President of the Fireman's Insurance Company, (*page 226.*) says the Yorktown was valued in November, 1852, for insurance pur-

poses, at \$12,000; and Myers sanctioned the transfer of the policy to Williamson in October, 1853.

A. M. Searls, President of the Merchant's and Manufacturer's Insurance Company, estimated the boat to be worth in November, 1852, \$12,000. Myers transferred the policy to Williamson in October, 1853.

The average estimate of all the witnesses would not, I apprehend, exceed \$15,000. So far, therefore, as the price agreed to be given by Williamson, it affords no evidence of fraud; it is true that the boat and barge sold for \$14,500 at the sale by the sheriff, but it must be recollected that steamboat stock increased in value after the purchase by Williamson—see Haldeman's deposition.

Whatever motive may have operated on Myers in making sale of his boat and barge Williamson did not participate in his wishes and intentions, if they were, as plaintiffs alledge, to defraud his creditors. There was no inducement held out to Williamson to aid Myers in smuggling his property to prevent his creditors from taking it to satisfy their claims.

The only evidence contained in this record, of the negotiations between Myers and Williamson, and what was said by each, is contained in the deposition of John G. Isham. His testimony is corroborated by other witnesses, and by many of the circumstances that surround the transaction.

A careful reading of the deposition of Isham will satisfy any unprejudiced mind that the sale by Myers to Williamson was made in good faith, certainly so far as Williamson was concerned; that the condition of Myers' affairs was such as required him to make sale of the boat, and the sale to Williamson, under the circumstances, was as advantageous as could have been made at the time.

A few extracts from Isham's deposition will be given: "He (Myers) proposed to O. C. Williamson to 'buy the boat, and said Williamson, after ascertaining the indebtedness of the boat, which was, I think,

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'over \$10,000, agreed to buy the Yorktown 2d, and
'barge Yorktown 2d, for \$15,000, giving a note pay-
'ably two years after date from October 19, 1853, in
'which was stated all the debts of the boat and barge
'were to be paid, and the balance of the purchase
'money was to be paid to said J. Myers; and further,
'that the note was to be left in my hands, and not
'given up to Myers until all the amounts paid to My-
'ers, and for debts of the steamer Yorktown 2d and
'barge Yorktown 2d, were indorsed thereon. Will-
'iamson hesitated to take the responsibility of the
'purchase until we promised that we would not push
'our claim unless it was necessary for our own safe-
'ty, and *would* sell him what goods he might want
'for the finishing the repairs of the boat, and would
'help him to start the boat out, which we agreed to,
'and did fulfill, upon he (Williamson) getting the
'boat insured for our own benefit; also, the first trip
'the boat went out to insure the freight list of same,
'which was done. The total indebtedness of the
'Yorktown 2d to us was, when she started from Cin-
'cinnati in November, 1853, over \$6,000 for stores
'and supplies furnished and money advanced, and
'our liabilities—\$750—as indorsers on the insurance
'notes, and \$600 indorsed on a draft payable in New
'Orleans, on which money was obtained by O. C.
'Williamson to start the boat out on." (Page 199.)

In answer to a question the witness says: "The
'sale was assured by both parties, Myers and Will-
'iamson, and was a real *bona fide* sale, as William-
'son was asked by Myers if he would take the boat
'and agree to give her back, which Williamson most
'positively refused to do, as he did not like undertak-
'ing all the responsibility of accidents to the boat,
'and not doing a prosperous business, without a pros-
'pect of the profits arising out of the same. Will-
'iamson handed me a list of debts, showing me the
'vouchers for same. \$13,654 34 was indorsed on the
'note of Williamson by me May 18, 1854." "Will-
'iamson showed me the vouchers for these separate

' amounts he had paid, and which he now holds in
' his possession." (Page 200.)

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The witness being interrogated as to the value of
the boat answered, "I think \$15,000 a fair price for
' the steamer Yorktown No. 2, and barge Yorktown
' 2d, at the time she was sold." (Page 201.)

I contend therefore—

1. That Haldeman and Walker are not competent
witnesses because of their direct interest in the re-
sult of the case.

2. That Myers is not a competent witness because
he is a party to the record, and interested directly in
the result of the judgment to be rendered.

3. Excluding these witnesses there is nothing on
which to base a decree in favor of the plaintiffs.

4. But if Myers is a competent witness the evi-
dence is insufficient to outweigh the denial in the
answer of Williamson, and the direct evidence in
corroboration of his answer.

And upon the whole record the judgment of the
circuit court should be affirmed.

Chief Justice MARSHALL delivered the opinion of the Court.

January 10.

On the 19th of October, 1853, Jonathan Myers ex-
ecuted to O. C. Williamson a bill of sale, transferring
to him, for the consideration of \$15,000, acknowl-
edged to be received for the steamer Yorktown, No.
2, and the barge Yorktown, No. 2. The bill of sale
was regularly recorded in the Custom House at Cin-
cinnati. But the consideration, instead of having
been paid, was secured or evidenced by the note of
Williamson of even date with the deed, and by
which he promised, two years after date, to pay to
the order of J. Myers the sum of \$15,000, with the
following additional words in the note: "But it is
' understood that the amounts due by the steamer
' Yorktown, No. 2 and barge is to be deducted from
' the amount above named—\$15,000; this note be-
' ing for the purchase of said boat and barge, and
' when said boat's debts are paid then the balance of

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'the purchase money, secured above, to be paid by O. C. Williamson to Jonathan Myers or his order.' This note was deposited with J. G. Isham, not to be delivered to Myers until the payments made by Williamson, of the previous debts of the boat, were credited on it by Isham, which debts were then supposed to amount to \$10,000 or more. In November, 1853, the boat entered upon the business of the season, which was prosecuted with great profit, O. C. Williamson acting generally as clerk, and his brother, Samuel Williamson, who was received on board after the boat reached the Mississippi on the first downward trip, acting from that time as captain.

On the 3d day of June, 1854, the boat having returned from her last trip to New Orleans for that season, and being in the county of Kenton, opposite to Cincinnati, she was attached by Smead, Collard & Hughes, who set up, in their petition for that purpose, four judgments against Myers, &c., rendered in Hamilton county, Ohio, and bearing ten per centum interest, and alledging that the transfer by Myers to Williamson was but colorable, and was made with the intent to defraud the creditors of the former, and especially themselves. Myers answered, admitting that the sale was not a real one, and alledging, in substance, that being embarrassed with debts, and unable to raise funds necessary for finishing the repairs of the boat, and for putting her in condition for entering upon the business of the season of 1853-4, from which he anticipated great profits, and being desirous to realize those profits for the purpose of paying his debts, and fearful that the boat, then in Licking river in Kentucky, would be attached if taken over to Cincinnati, he made the transfer to O. C. Williamson, then a clerk in the store of Isham & Fisher, (the principal creditors of the boat,) and who had formerly been a clerk on his boat, under an arrangement that his brother, Samuel Williamson, should be captain or master, and O. C. Williamson

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clerk, at a salary better than he was then receiving, and that the net profits were to be appropriated to the payment of debts of the boat, and other debts of Myers, and that at the end of the season the boat was to be restored to him, Myers. O. C. Williamson answered, denying fraud, insisting on the fairness and validity of the sale, and claiming the boat as his. In each of these answers particulars are stated which it is not necessary now to detail. Many depositions were taken by the parties respectively, and among them the plaintiffs took those of Myers and his wife, and also of Walker and Haldeman, each of whom was bound for one of the debts of Myers set up in the petition.

Soon after the commencement of the suit, to-wit, in August, 1854, the boat was publicly sold under an order of court, and brought \$14,500, on a credit of six months. And on that hearing, the four depositions above mentioned having been rejected, on the ground of incompetency of the witnesses, and the court being of the opinion that although, without their testimony, the intention of Myers in making the transfer was sufficiently established, there was no satisfactory evidence of Williamson's participation in it, the petition was dismissed with costs; and from that judgment the plaintiffs have appealed.

The first question arising in the case, as presented in this court, is whether the circuit court erred in rejecting the depositions above referred to, or either of them. The interest of Walker and Haldeman in subjecting the boat or its proceeds to the satisfaction of debts, for which they are themselves bound, for a principal probably insolvent, is obvious; and their competency is scarcely insisted on. But a serious question is made upon the rejection of the deposition of Myers, who, it is contended, has an interest on both sides, equally balanced, inasmuch as if the boat is subjected he loses his claim upon the note, which he will have if the boat is determined to be the property of Williamson, under his purchase; and

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if the deterioration of the boat be considered it is contended that the balance of interest is against the plaintiffs, who offer the witness. But it appears that credits have already been indorsed on the note by Isham, with whom it was deposited, for about \$13,000, for payments made by Williamson, on debts existing against the boat before the transfer; and although it be conceded that this indorsement does not satisfactorily prove the amount of such payments actually made, still, if the precise amount may be uncertain, it is certain that a large portion of the debt due to Isham & Fisher, of several thousand dollars, has been paid by Williamson. And if it were conceded that in case nothing had been paid upon the contract of purchase, the loss of the price to be paid on that contract would be equivalent to the gain by subjecting the boat to the demands of the plaintiffs, still as there have been large payments on the note, greatly exceeding the deterioration of the boat, and by which Myers has been, to some extent, finally relieved from his debts, he will, if the boat be now subjected to other debts due by him, be the gainer by the entire difference between the price which Williamson was to have paid and the proceeds of the boat as sold under the attachment, with the addition of the sums already paid by Williamson in discharge of debts of the boat due before his purchase. To the extent of this difference, certainly amounting to a large sum, and perhaps equal to or exceeding four-fifths of the price to have been paid by Williamson, Myers would, by subjecting the boat in this case, realize a double payment or a double price on it, except so far as the costs of the present proceeding may affect this result.

If the subjection of the boat, in this case, would authorize a recovery against Myers for the breach of his warranty, or his covenant against incumbrances, this liability, consequent upon a termination of the suit in favor of the party calling him, might be deemed equivalent to the advantage gained by that event. And, as such a liability would be avoided by a differ-

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ent termination of this suit, his interest might be regarded as balanced, and he would be a competent witness against his vendee, even to impeach the sale on the ground of fraud. The same consequence would follow if the subjection of the boat would render him liable to re-pay to Williamson the full amount that he had paid to, and for Myers under the contract of purchase. But, although, in such case Williamson would lose the boat, or rather would lose the benefit of his purchase, it would not be on the ground of any defect in the title of Myers but on the ground of a fraud, in which Williamson participated, so as to render his purchase void as against the creditors of Myers; and as this result would not disprove or defeat but affirm the title of Myers, and would only defeat the title of Williamson, on account of his own wrong, it could not establish or amount to a breach either of the warranty of title or of the covenant against incumbrances; nor, as we suppose, would the law imply a promise or impose a liability to re-pay to Williamson the sums which he had paid to or for Myers, in pursuance of a contract made with intent to injure and defraud third persons, and which the law itself makes void as to them. It is true the statute declares such a contract void only as to the creditors and purchasers intended to be defrauded; but even this declaration is equivalent to prohibition, and would have made the contract illegal if it had not been so before the enactment of the statute. It is a contract in violation of good morals, inconsistent with honest purposes, and therefore against public policy, and not countenanced by the law nor by the tribunals which administer the law. To such a transaction the maxim applies, *ex turpi causa non oritur actio*. From such a foundation no cause of action can arise; and this is true not only as to any action for the enforcement, or for a breach of the vicious contract itself, but also as to any action by which either party may attempt to regain from the other what, by reason of the invalidity of the trans-

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action as to third persons, he may have lost for the benefit of the other party, and he could not sustain an action either on the contract or for its breach, or on any implied liability to refund what he had paid on it. The law regarding both parties as equally implicated in an illegal transaction, will not interpose in behalf of one of them, either to enforce the illegal contract or to relieve him from the consequences of either a partial or a full performance of it. And this is the only effect which, without defeating the object of the statute, and the certain policy of the law, can be given to the implied declaration that the contract, though void as to creditors, &c., is valid as between the parties to it. The law leaves the parties where they place themselves. If the vicious contract is wholly or partially unexecuted, it will not coerce its execution, and neither party gains by it farther than it is executed by themselves. If it is to any extent executed by the parties themselves, the law will not replace them in *statu quo*, though one of the parties be a loser by the avoidance of the contract. This inability of each party to recover what he may have lost by the illegal transaction, and the liability which even the fraudulent vendee may incur to third persons by his participation in it, are the penalties by which the law intends to prevent fraud, and to enforce the observance of honesty and good faith.

It is said, in argument, that according to the principle settled in the case of the *Planters' Bank of Tennessee vs. Baker*, decided at the last term, Williamson, in the event of the loss of the boat, in this suit might, to the extent of his payments, be substituted to the rights of the creditors of Myers, and to their liens on the boat; and that Myers would therefore gain nothing by the subjection of the boat. But the principle of the case referred to is not understood to admit of the application contended for. If the plaintiffs here were attempting to make Williamson liable for the profits of the boat made while he controlled her

under his purchase, it would be just that he should have credit for the debts of Myers which he had paid out of those profits, and especially for such as had liens upon the boat. And as he would be entitled to these credits upon general principles of equity, even if the payments had not been made under the fraudulent contract, the fact that they were made in pursuance of it ought not to prevent him from receiving them. The most that the attaching creditors could claim, in such a case, would be that the profits should be regarded as belonging to Myers, and subject to his debts; and so regarded the fund would be subject to diminution by the amount of all disbursements fairly made in payment of his debts, and the creditors claiming afterwards, by attachment, would be entitled only to the balance, because nothing more could be regarded as his. But this allowance to Williamson would not imply any further liability to him on the part of Myers, and it would not diminish his interest in having the boat subjected to his debts not yet paid, because it would not admit a right in Williamson to participate in the proceeds of the sale under the attachment, nor in fact to any interest in the boat itself, although, if he was an actual creditor of Myers, beyond and independent of the fraudulent contract, the chancellor might not wrest from him the possession of the boat without providing for his just claims. And this measure of favor, which is not involved in the present case, because Williamson's payments were made from the profits of the boat, is, as we apprehend, the utmost which could be justified by the principles of the case referred to.

Upon the whole, therefore, we are of opinion that Myers had a preponderating if not an exclusive interest in the event of this suit, and in favor of the plaintiffs, and that he, and consequently his wife, were incompetent witnesses on that side; although if offered by Williamson, they would have been competent to sustain the sale to him, because their interest

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1. One having an interest both for plaintiff and defendant, but whose interest preponderates on one side, is not a competent witness for that party on whose side his interest

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is greatest; nor is his wife. The rule is general, almost without exception, that a vendor is a competent witness for his vendee, but incompetent for a creditor of such vendor, who levies upon property, to prove fraud in the transfer.

as the case stands, would have been on the other side. This distinction and the conclusion at which we have arrived upon the question, are sustained by the cases of *Raglan vs. Wickware*, 4 J. J. Marsh., 530; *Paul vs. Rogers, Admr's*, 5 Mon. 164, and other cases in this court, and by an elaborate citation of authorities in note 111, page 120, of the 2d volume of *Phillips on Evidence*, by Cowen and Hill, which conclude with stating as "a rule almost unincumbered by exception, that the vender is a competent witness for his vendee, but not for his levying creditor, who offers him on the assumed ground of fraud." There was therefore no error in rejecting the depositions of the four witnesses above designated, and we put them out of view in our consideration of the case. But independently of those depositions, and giving due weight to the testimony of Isham, who had a nearer connection with the actual transaction between the parties, and might have known more of their motives than any other competent witness, we are of opinion that however fair and honest the parties may at the time have supposed their motives and the transaction itself to be, the established facts and circumstances of the case and of the parties, repel the conclusion that the sale was in fact a real one, and establish as the only admissible deduction, the fact that the form of a sale was resorted to as a means of at once avoiding the attachments which were feared, and satisfying Isham that the boat would be so managed as to furnish a prospect of the debt to his firm being paid out of the profits, and at the same time of providing for the payment of other debts of the boat out of the profits; and that the transfer was made with the understanding between the parties that the boat was still the property of Myers, and to be finally restored to him, or disposed of for his use.

What particular inducements may have been held out to Williamson, or why the transfer was made to him, the evidence does not fully disclose. But while the circumstances disclosed enable us to account for

2. Where there has been a fraudulent sale made with the intent

the selection of him to take the title and management of the boat under a sham sale, and to control her earnings for the benefit of others, with the right and power of securing to himself a fair and liberal compensation, there is nothing which explains why if the sale was intended to be a real one it was made to him; and there is no single circumstance outside of the formal transfer to him, which accords with the supposition that the sale was intended to be an absolute and irrevocable transfer of the boat. He was clerk in the store of Isham and Fisher, in Cincinnati, engaged at a salary of \$1,000 a year, and possessed of no property but his residence in Covington, worth at most \$3000. He had been a clerk on steamboats, and was at some period acting in that capacity for Myers. He had no means to purchase a valuable boat. He could no more have thought seriously of purchasing such a boat as a real transaction, upon his own means and responsibility, than the owner (unless he was ready to give it away), would have thought of selling it to him without security. And yet the boat was transferred to him without security, at a recited consideration, less by one-fourth than the lowest estimate which Myers had ever placed upon her; less by \$3,000 than he could have obtained for her in prompt payments, in the summer of 1853, before she had received the repairs which were nearly completed at the date of this transfer; and she was transferred upon terms of payment, which as to the time given, as well as the absence of security, were entirely out of the usual course of similar transactions; being such a sale as no witness had ever heard of; and on looking to the mode in which the payment might be made, we see that it was optional with Williamson whether he would discharge the debts of the boat, and that as he had no other means but from the profits, either of doing this, or of otherwise paying the price, or so much as might not be paid in this way, Myers in transferring the boat and her anticipated profits to him, not only gave up him-

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of securing to the vendor a future interest in the property, and the sale is for less than the value of the property, the chancellor will set aside such sale, and subject the property to the payment of debts due to judgment creditors.

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self, and placed in the hands of Williamson the very means by which he was to make payment, and the only means by which he would be enabled to do so, but left himself without recourse, in case the boat should be lost without making profits, or should be sold by Williamson for money.

The boat must have been worth considerably more on the 19th of October, 1853, when nearly fitted for commencing the business of the season, than she was in August, 1854, when after being in service for six or seven months, she brought on a credit of six months, nearly as much, well secured, as Williamson was to give out of her profits in the course of two years. The lowest estimate of her vendible value, made before the sale in October, is \$15,000, by a witness who says Myers about that time offered to sell her to him for \$20,000; an offer considerably below his usual estimate of her value, and which if made, is to be attributed to the urgency of Isham in pressing for payment or security for the demand of his firm, then amounting to near \$5,000, against the boat.

It is proved that Myers had high expectations with respect to the profits of the approaching season; that he had apprehended attachments upon the boat, by which he might be prevented from reaping those profits; that he was unwilling to sell the boat, but wanted to place her in the hands of a friend who would keep her for him, so that he might be thereby enabled to pay his debts. Isham who advised a sale, and insisted on the boat being placed in other hands for management, as the only means that would secure or satisfy his firm, knew that Myers was unwilling to sell, but that he desired to make a sham sale. His clerk, without means, is the person to whom the transfer is made, upon the terms which have been stated, and after his hesitation, as Isham says, had been removed by Isham's promise of forbearance and assistance. But Isham took good care to have not only the boat, but also the freight of the first trip in-

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sured for his benefit; while Myers with a greater interest at stake, required no security; took no indemnity; and so far as appears, left the entire arrangement in the hands of Isham and Williamson. And although Isham says Myers proposed to Williamson to buy, it does not appear that he named the price, or the terms; and he certainly exacted no stipulation for his own safety, except for the payment in two years, of a sum which reduced to its value at a discount accordant with the rate of interest on the judgment against him, was equal only to about \$12,000. The arrangement was made to avoid all attachments, and to secure Isham. It was evidently stimulated by his charges of bad management, and his urgency to put the boat in other hands. It was obviously an arrangement for securing through Williamson's management of the finances of the boat, the debts due to the firm of Isham and Fisher; and from which, Myers, if he was not to retain his right to the boat, derived no advantage, unless in saving the boat from attachments against her in his own hands, and in enabling Williamson to appropriate the profits to paying the debts to Isham and Fisher, and such other debts of the boat as he might choose to pay, and in this way to discharge the price to be given for her. And as Williamson in taking charge of the boat was to protect the interest of Isham, so Isham in taking charge of the note for the price, was to protect the interest of Williamson. And he has done so by crediting the note with more than \$13,500, under a date preceding by a few days the commencement of this suit; but which from his own statement, was probably not in fact done until after the suit was brought, and upon such evidences of payment, though satisfactory to himself, he did not retain, and does not produce in giving his deposition. That the credits were to be made up between him and Williamson, is of a piece with other features of the transaction, which go to show that this was a case of confidence, and not a real bargain in which adversary interests are asserted, and to be protected

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or guarded against. And it is to be observed that even Williamson, coy as he was about assuming the responsibility until encouraged by Isham, never visited the boat for the purpose of inspection, nor even enquired into her precise condition or suitableness for being put into the business of the season. Is it to be presumed that a poor man about to incur a real responsibility to the amount of five times the value of his whole estate, would make no enquiry into the condition and value of that which was to be the consideration of this responsibility? If it is to be presumed that he knew the condition and value of the boat, may it not with equal reason be presumed that he knew the condition and purposes of the owner, who was proposing a transfer; and that he knew the objects of his own employer, who took so prominent a part in causing it and carrying it into effect? If, as may be assumed, he knew with reasonable certainty the value of the boat, he knew that the price which he agreed to pay, and in the mode fixed on, was greatly below the real value; and in fact scarcely more than nominal in comparison with it. Did he suppose that such a bargain was proposed or agreed to by Myers, merely out of kindness to him? Did he not know that the proposed transfer, was intended to evade the remedy of the creditors of Myers, to satisfy and secure Isham and Fisher, his own employers, and to aid Myers by applying the profits of the boat to the payment of his debts? That it was so intended by Myers, and that Isham knew it, is absolutely certain. Isham does not even say that the transfer was intended to be real, or that he himself considered it to be so. And if it could be doubted whether Myers disclosed his purpose to the person chosen to effectuate it, or whether Isham, who also had an object to be effected by the same instrument, did not put him in possession of what he knew on the subject, still, the conduct of these parties, and the nature and circumstances of the transaction itself, were such as must have apprized him of its

real character and objects. *Res ipse loquitur*. And to suppose that he really did not know that the sale to him, whether originally conceived of and proposed by Myers or not, was to be but a sham, intended to effectuate the objects above mentioned, or at any rate the two first, is to suppose that he wilfully closed his eyes and mind to circumstances fully within view, and to their palpable and certain indication. We cannot suppose this. But assume that he did know that the sale was intended to be a sham, and an obstruction and hindrance to creditors; and that as he became a party to it without necessity, the presumption is that he concurred in it. But whether he intended it to be a sham sale, or whether knowing it was so intended by Myers, his own intention from the first was to take advantage of its form for his own benefit, and to the injury of Myers, is immaterial. Having without necessity or excuse, aided Myers in a disposition of his property, fraudulent as to his creditors, they have the right if he has not, to go behind the form and expose, and take advantage of the real character of the transaction: which, if it had really been intended by both parties to be an absolute sale, was such a one as Myers in justice to his creditors had no right to make.

The evidence discloses many particulars, bearing for or against the conclusion which we have stated, but preponderating decidedly, as we think, in favor of it. We need not encumber this opinion with a detail of them, but merely add, that if this sale is to be sustained, it would evidently have been much better for Myers to have permitted his boat to be attached and sold when she was newly repaired, and would, as the subsequent sale and other facts prove, have brought a much better price, payable in a short time and well secured; and it is not to be forgotten in considering the intent of the transfer, that while the absolute bill of sale acknowledging payment of a price which though low, might not, if actually paid, have been evidence of fraud, no part of the price

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was in fact paid, and the real terms of the transfer, so grossly misstated, were not only not made public, but in fact kept private and concealed.

Wherefore, the judgment dismissing the petition is reversed, and the cause remanded for a judgment giving to the plaintiffs the proceeds of the sale of the boat.

16m 542
96 417
16m 542
97 566

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FET. Eq.

APPEAL FROM MONTGOMERY CIRCUIT.

Where the board, whose duty it is, decides that one chosen clerk of a county court by a majority of votes, is intelligible and cannot take the office, and that it is vacant, it is the duty of the county judge to appoint a clerk to serve until the succeeding August election. The former clerk has no right to hold the office.

The facts of the case are stated in the opinion of the court. *Rep.*

K. & S. Farrow for appellant—

1. The first question arising is, was Garrett eligible at the time he was voted for. The agreed facts show that he was not. (*Sec. 1-2, Art. 6, Constitution.*)

2. That as Stevens was the only candidate voted for who was eligible, he was elected to the office for the ensuing term.

3. That although Stevens may not have the right to claim the office by the vote last given, yet he has a right to hold the office in virtue of his first election, until another is duly chosen and qualified.— (*Rev. Stat., art. 2, sec. 2, p. 300.*)

We insist that Stevens has been illegally ejected from the office, and suffered injury. What is the mode of redress? We insist that the mandamus is

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the appropriate remedy. (See *Code of Practice*, sec. 523 to 526.) The Code provides that the party shall file his petition and give notice. It is not said expressly in what court it is to be filed; but we understand it to be an ordinary petition to be tried as expressly provided by *the court*. It is a proceeding in *ordinary*, not in equity. This is the distinction required to be made, and a guide to the clerk. (See *Code of Prac.*, p. 32, sec. 118.) The proceeding is in conformity with the Code, and tried as the Code directs. We think the proceeding has been conducted properly and before the proper tribunal. (See *Code*, sec. 526.) And we rely upon the case of *Dew vs. The Judges of the Sweet Springs District Court*, 3 *Henning & Munford*, p. 1, as having a decisive bearing upon this case. It is there decided that the writ of mandamus is the proper proceeding to restore a clerk to an office from which he has been improperly ousted.

It is denied that the board appointed to try the contested election had any right to declare the office of clerk vacant; they transcended their power. (See *Rev. Stat.*, 295, sec. 8.) Neither could the county court declare the office vacant. Both these tribunals are created by statute, and can only perform such duties as are conferred by statute. This court has defined the power of this board to try contested elections in the case of *Kirtley vs. Newcum*, 13 *B. Mon.*

If there was no election in August, 1854, it was the duty of the board to order a new election, and it was the right and duty of Stevens to hold the office until another was elected and qualified.

By article 6, section 1, it is declared that the term of office of the clerk shall be the same as that of the county judge. By section 30, article 4, concerning county judges, it is declared that "they shall continue in office until their successors be duly qualified."—Now, so far as the statute (See *Rev. Stat.*, 291,) interferes with this constitutional provision, it is a nullity.

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Tho. Turner for appellees—

It is contended by Stevens' counsel that Stevens was elected county clerk at the August election, 1854. They think that as Garrett was ineligible, all the votes cast for him were a nullity, and Stevens was elected. Were we left without a statutory provision on this subject, their reasoning could not be sustained.

It is the intention of our constitution that the people shall have the selection of their officers, and had not Garrett been a candidate, the people might, and probably would, have elected some person other than Stevens.

But the Revised Statutes say that where an ineligible candidate receives the highest number of votes, his opponent shall not be considered elected, but declare the office vacant, and that there shall be a new election. (See *sub-division 8 of the 1st sec. Revised Stat., p. 295.*)

It is clear, then, that Stevens was not elected clerk at the August election 1854, and the board of contested elections properly decided that there was no election, and the office was vacant.

In saying that under the circumstances named, the board should order an election. The statutes substantially say there was no election, and that the office is vacant.

But by *Revised Statutes, page 295*, the decision of the board is final, and cannot be revised. And in *Newcum vs. Kirtley*, the court says the board had a right to decide that there was no election, and hence a vacancy which was properly filled by appointment.

It is true that in *Newcum vs Kirtley, 13 B. Mon.*, this court say they will revise the decision of the board when it shows on its face that the facts upon which they based their conclusions did not legally authorize it. But such is not the case here. The board was substantially required by statute to do what they

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did, and did not supercede their duties. It is true that the board did not order a new election, but they decided there was no election, and a vacancy; and by *Revised Statutes*, p. 291, there is a vacancy when there is no election; and by *Revised Statutes*, p. 293, the county judge is directed to fill that vacancy until the next August election, and issue a writ of election to be held the next August, to fill it, as was in fact done in this case; and the constitution (p. 67 *Rev. Stat.*) says that vacancies in the offices of county court clerk shall be filled in such manner as the general assembly shall by law provide.

Hence we conclude that the office was vacant, and that the appointment of Wyatt was regular and right.

But it is contended as Stevens was elected clerk in 1851 until 1854, that under section 30, article 4 of the constitution, (see *Rev. Stat.*, p. 64,) and under section 1st, article 6th of the constitution, (see *Rev. Stat.*, p. 66,) he was entitled to hold the office until another election could be held, as he was entitled to hold it until his successor was qualified.

We admit that he was entitled to the office until his successor was qualified, but think that Wyatt was his legal successor.

We suppose an office is vacant when the time expires for which the incumbent was elected or appointed; but it is, under this clause of the constitution, contended that there was no vacancy; under such a construction of the constitution there never could be a vacancy except in case of death, resignation or removal, and under this construction no officer ever can be elected or appointed to fill a vacancy while there is a living incumbent who wishes to hold on.

It was the design of the framers of the constitution to provide an incumbent under all circumstances to do the public business; and there may be a vacancy in an office which has an incumbent; and such is always the case where the newly elected officer is not sworn in at the time required by law.

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But some emphasis is laid by the plaintiffs' counsel on the fact that the county judge alone appointed Garrett.

By *article 21st, p. 234, Revised Statutes*, the office of associate justices are abolished, and justices of the peace do not constitute a part of the court except in the transaction of financial business.

But even if these matters were in favor of the plaintiff, he could not maintain his application for a mandamus since the adoption of the Code of Practice. The *526th section of Code of Practice, p. 148*, provides that a writ of mandamus is only to be used by a superior court to compel an executive or ministerial officer to do some act in accordance with law, or to refrain from some act in violation of law. In *Bruce vs. Fox, &c., 1 Dana, 447*, and in *Newcum vs. Kirtley, 13 B. Mon., 515*, this court virtually decided that the act of the circuit judge in refusing to let the proper person to qualify as clerk, or attorney for the commonwealth, was a judicial act, and subject to be revised on writ of error or appeal, and certainly such refusal on the part of a county judge was also a judicial act, and the proper remedy was by writ of error or appeal. And again, the county judge is not an executive or ministerial officer, but a judicial officer, and the mandamus could not be awarded against him. The Virginia case cited by the defendant does not apply since the adoption of the Code of Practice, which repeals all modes of proceeding in circuit courts, except those therein pointed out. (See *Code of Practice, sec. 748, p. 201, and sec. 875, p. 227.*)

An affirmance of the case is, therefore, asked and expected.

January 17.

Judge SMITH delivered the opinion of the Court.

Stevens, the clerk of the county court of Montgomery, was a candidate for re-election to that office at the August election, 1854. He was defeated by Garrett, an opposing candidate, by a majority of 48

votes, and the latter received a certificate of election.

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Having ascertained that Garrett was constitutionally ineligible to the office for the want of a certificate of qualification, and proper residence in the county; and being informed that he would be admitted to discharge the duties of the office by the county judge, notwithstanding his disqualification, Stevens procured an injunction against his admission to the office, until he could, under the provisions of the statute, contest the election.

Notice was served upon Garrett, and the facts being argued before the county board, it was adjudged by the board that Garrett was ineligible: 1st. Because he had no certificate of qualification; and, 2d. Because he had not been a resident of Montgomery county for one year next preceding the election; and, also, that there had been no election, and that the office was vacant.

This decision was returned to the county court, and thereupon an order was made by the county judge appointing Andrew J. Wyatt clerk of said court "to fill the vacancy occasioned by the failure to elect."

Stevens then amended his petition by setting forth the foregoing facts, and obtained a rule against the county board, county judge and Wyatt, to show cause against a mandamus compelling the board to award that he was the clerk, the judge to restore him to his office, and Wyatt from further intermeddling with the office.

The defendants responded, and relied upon the legality and validity of their acts in the premises in discharge of the rule. Upon final hearing the mandamus was refused, and rule discharged, and from that judgment Stevens has appealed.

As the facts respecting Garrett's ineligibility were agreed, no doubt is entertained of the propriety of the action of the board in refusing him a certificate of election. Nor have we any, that Stevens was not entitled, in virtue of the election in 1854, to hold the

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votes, is intelligible, and cannot take the office, and that it is vacant, it is the duty of the county judge to appoint a clerk to serve until the succeeding August election. The former clerk has no right to hold the office.

office. The 1st section of the 6th article of the constitution, determines the right of Garrett, and the *Revised Statutes*, art. 7, sec. 8, p. 295, is conclusive of Stevens' right to the office under the last election.

The appellant, however, contends that the action of the county board, in declaring the office vacant, because no election was held; and that of the county judge in appointing Wyatt and removing him, was void and wrongful; because, as he insists, by the constitution, there was no vacancy in the office, and he had the right to hold and enjoy the same, in virtue of his election in May, 1851, until the next regular election succeeding the determination of the county board, when a successor could be *elected*, and until such successor "*was duly qualified*." In support of this position, we are referred to the 1st section, 6th article, and 30th section, 4th article, of the constitution.

By the former it is provided that "the *term of office*" of the county clerk "shall be the same as that of the presiding judge of the county court." By the latter it is declared that "judges of the county court shall be elected by the qualified voters in each county, for the *term of four years*, and shall *continue in office until their successors be duly qualified*."

It is contended that the continuation herein provided, is a part of the term of office of the county judge, and as, by the other section referred to, the term of the county clerk is the same as that of the county judge, that he has the right, as a part of his official term, to hold the office until his successor is qualified. And moreover, that an election is an indispensable pre-requisite to the qualification of such successor; and being so, that Stevens, being the incumbent, consequently has the right to hold on until after the election and qualification of his successor at the next regular election.

If this be so, the 11th section of article 7th, chapter 32, *Revised Statutes*, 295, which provides "where a new election is ordered, or the incumbent adjudged

not to be entitled, *his powers shall immediately cease*; and if the office is not adjudged to another, *it shall be deemed vacant*;" under which the county board declared the office in question vacant, must be regarded as in contravention of the constitution, and of no effect; and the action of the board, and county judge, complained of, wrongful and in violation of the constitutional rights of the appellant.

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We do not assent to the correctness of the proposition.

The term of office for the county judge, as well as of all others created by the constitution, is definite. The continuation in office after the expiration of the term, though a right pertaining to the incumbent, and of which he cannot, except in the mode prescribed by law, be deprived, is not, properly speaking, a part of the term. Such continuation was manifestly designed to obviate any inconveniences that might attend vacancies occurring between the expiration of the term of the incumbent and the qualification of his successor.

The term of the presiding judge of the county court is four years, and, by the constitution, he is to continue in office until his successor shall be qualified. The term of office of the county court clerk is the same, but there is no constitutional provision continuing him in office until his successor is qualified. So that appellant's right to hold the office, if he has any, is not conferred by the constitution.

That it was not intended by the framers of the constitution to provide, in that, and the other offices named in the 1st section of the 6th article, for a continuation in office of the incumbent, after the expiration of the term and until the qualification of the successor, as was done in the office of county judge, is, we think, not only manifest from the absence of such continuation in express terms, but likewise from the provision contained in the 7th section of the same article, which expressly confers upon the general assembly the power to provide for vacancies occurring

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in offices created by the 6th article. (*7th sec. 6th article, Constitution.*)

This section seems expressly intended for the purpose of enabling the legislature to make such enactments as would meet and provide for any contingency or difficulty that might arise or exist in regard to vacancies, or other emergencies incident to the offices referred to.

To have made such provisions in detail in the constitution, with respect to the many subordinate offices in the state, would have been altogether impracticable, and hence the necessity of conferring the power upon the general assembly. No better illustration of the necessity of such power, and the propriety of the legislative enactments thereunder, could be furnished, than is afforded by the present care.

Having disposed of the assertion of appellant's right under the constitution to hold over, it only remains to enquire whether the statutes, under which the proceedings under revision were had, have been complied with.

The *8th sec., art. 7, chap. 2, Revised Statutes*, provides, among other things, "that where the person returned is found not to have been legally qualified to receive the office at the time of his election, a new election shall be ordered." The *11th section, same chapter and article*, provides: "when a new election is ordered, or the incumbent adjudged not to be entitled, his powers shall immediately cease; and if the office is not adjudged to another, it shall be deemed vacant."

Here, under the submission of facts before the county board, appointed in the chapter last referred to to determine contested elections, it was properly determined that Garrett was ineligible to the office, for reasons already stated, the incumbent not adjudged to be entitled, and the office declared vacant. This determination of the county board was properly communicated to the county court, and entered of record; and it became the duty of the presiding

judge of that court to supply the vacancy by appointment.

This is imposed on him by the *5th sec., art. 6th, of chapter 32, Revised Statutes*, which provides "that a vacancy in the office of county court clerk shall be filled by the county court until the succeeding August election, and a writ of election issued by the judge thereof to fill the vacancy." The appointment of a clerk being, in our opinion, within the power of the county judge, and not one of those acts which require the concurrence of a majority of the justices of the county. This duty he seems to have discharged by the appointment of Wyatt; and to enable the appointee to exercise and discharge the duties of the office, it was indispensable that Stevens should deliver up to him the books and papers of the office.

As the foregoing view determines the points raised upon the merits of the controversy, it is not deemed necessary to discuss the manner of proceeding.

Judgment affirmed.

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vs.
GOLDEN,
and
HILL'S HEIRS
vs.
SAME.

Hill vs. Golden.

CASE 25.

Hill's Heirs vs. Same.

PET. EQ.

APPEALS FROM MADISON CIRCUIT.

1. Where the husband conveys land during the coverture, the widow suing for dower is not entitled to rents; even from the time of commencing her suit. (*Webber vs. Burges*, M. S. opinion, of June Term, 1855; 4 B. Monroe, 368.)
2. The proper criterion of recovery against the heirs of a grantor upon a covenant of warranty, when there is a recovery of dower, "is that proportion of one-third of the consideration paid for the land, which the value of the life estate in the allotment made, bears to the value of an estate in fee therein.
3. The claim of a grantee against the heirs of a grantor, upon a covenant of warranty, is not a valid defense by way of counter claim to a claim of dower, by the widow of the grantor, under the 126 Sec. of the Code of Practice.

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and
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Case stated.

In the year 1847, Humphrey Hill, for the consideration of three hundred dollars, conveyed by deed with general warranty, seventy-four acres of land to Lurania Golden. In 1842, Hill had given to Lurania Golden his bond for the conveyance of this land, in which the consideration is stated to be, that Fielding and Harrison Golden, two illegitimate sons of Lurania Golden, are to comply with the directions of Hill during his lifetime, and that Hill was to keep possession of the land so long as he lived. Humphrey Hill died in 1854, leaving Mary Hill his widow, and Green B. Hill and others, his heirs-at-law. In 1854, Mary Hill filed her petition claiming dower in the seventy-four acres of land aforesaid.

The right of dower is conceded in the answer, but a counter claim is set up against the widow, administrator and heirs of the grantor; arising out of the covenant of warranty; to this counter claim, there was a demurrer which the court overruled, and a response was made by plaintiffs. Judgment was rendered in behalf of the widow for dower in the land, without any allowance of rent. And also, a judgment against Hill and heirs, for \$210 35, to be levied of estate descended. From this judgment the parties respectively have appealed.

S. Turner for Mrs. Hill.

Argued—1. That the court erred in not allowing rents upon her dower interest in the land, from the commencement of her suit, which the commissioner's report shows to be worth \$35.

2. The court erred in overruling the demurrer to the counter claim of Mrs. Golden. 1st. Because the claim of Mr. Hill is against Mrs. Golden alone; and the claim set up as counter claim, is, if valid, against the administrator and heirs of Hill, who are not parties to the suit. 2d. The claim is not valid as a counter claim, under the 126 Sec. of the *Code of Practice*. 3d. It is not alleged that there is

not assets or estate descended to satisfy the warranty.

3. It is insisted that the consideration passing to Hill for the conveyance, was a transferred consideration, and grew out of illicit intercourse. If the inducement which led to the agreement was illegal, the agreement is void. (3 *Bibb*. 500; 6 *Dana* 91; 8 *Ib.* 97; *Chitty on Con.* 673, 792.) If only part of the consideration be vicious, the whole contract is void. (*Fetherston vs. Hutchison*, *Croke Eliz.*, 199; 1 *Bing.*, *N. C.* 662; 2 *Ib.* 646; *Smith's leading cases*, vol. 43, 2845.)

Mrs. Golden does not come into court with clean hands. The evidence shows that Hill did spend much time with her, after the date of the bond of 1842, in defiance of religion, morality, and law; and to the great mortification of his wife and children. It is against the policy of the law, to give any sanction founded in whole, or in part, on such consideration. And if the proof is not positive, even strong suspicion is sufficient to send the parties to a court of law.— (*See authorities supra.*)

4. The amount adjudged to Mrs. Golden, is too great; the criterion of recovery has been wholly mistaken by the court. If entitled to any recovery, it should not exceed "the proportion of one-third of the consideration expressed in the deed, which a ten years purchase bears to the *fee simple*." The court gave the value of the use of the land for ten years from the eviction.

W. H. Caperton for Golden—

1. Insisted that the counter claim set up, was a valid claim, growing out of the facts in the case.— The consideration of the conveyance is not asserted in such way as to authorize any inquiry into it. No fraud or mistake is proved. (*See* 2 *Litt.* 209; 2 *J. J. Marsh.* 265; 3 *Ib.* 107; 5 *Ib.* 144.) The services of Fielding and Harrison, the two sons of Mrs. Golden, was of greater value, between 1842 and 1847, than the consideration expressed in the deed; until which

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1. Where the husband conveys land during the coverture, the widow suing for dower is not entitled to rents, even from the time of commencing her suit. (*Webber vs. Burgess*, MSS. opinion, June term, 1855, 4 B. Mon., 368.)

2. The proper criterion of recovery against the heirs of a grantor, upon a covenant of warranty, when there is a recovery of dower, "is that proportion of one-third of the consideration paid for the land, which the value of the life estate, in the allotment made, bears to the value of an estate in fee therein."

3. The claim of a grantee against the heirs of a grantor, upon a covenant of warranty, is not a valid defense by way of counterclaim to a claim of dower by the widow of the grantor, un-

time, Hill held the possession of the land, when he expressed himself satisfied as to the price.

2. The counter claim is good under the *Code of Practice*, sec. 126.

Judge STILES delivered the opinion of the Court.

Humphrey Hill, the husband of the appellant, and grantor of the appellee, had conveyed the land in question during coverture, and in such cases, as repeatedly held by this court, the dowress is not entitled to back rents, even from the commencement of the suit. (*Webber vs. Burgess*, M. S. opinion, June term, 1855. 4 Ben. Mon., 368.) The failure to allow Mrs. Hill back rents, from the beginning of the suit, was therefore not erroneous.

The judgment upon the counter claim against the heirs at law of Humphrey Hill, is, however, deemed erroneous.

First. Because it is for too much. The extent of the liability of the estate of the grantor upon the warranty, is that proportion of one-third of the consideration paid for the land, which the value of her life estate in the allotment made, bears to the value of an estate in fee therein. This is a case of an eviction by paramount title, to the extent of a life estate in one-third in value of the land. The consideration paid is to be considered, in determining the criterion of the damages to be recovered, and the proportion of that consideration estimated as above indicated, is the extent of the grantee's demand upon the estate of her grantor.

Second. The judgment was unauthorized as a counter claim against the heirs of Humphrey Hill.—The Civil Code, (sec. 120,) limits in terms, a counter claim to "a cause of action in favor of the defendants or some of them, *against the plaintiffs or some of them*, arising out of the contract, or transactions set forth in the petition, as the foundation of the plaintiff's claim, or connection with the subject of the action."

The counter claim here is based upon the warranty of the grantor, in the deed to the defendant, Mrs. Golden.

It is true the personal representatives and heirs and distributees of the grantor, are liable upon that warranty; but the liability of Mrs. Hill as a distributee, had she, as dowress, received one-third of the personalty, depends upon the failure of assets in the hands of the administrators and that of the heirs at law, though they may be sued jointly with the administrators, is dependant upon the same contingency.

It does not appear by allegation, or otherwise, that Mrs. Hill is liable to the appellee upon her counter claim. No averment of an insufficiency of assets is made in the answer; and no such insufficiency is otherwise shown. She is the only plaintiff in the action; and the demand by way of counter claim, not being available, as presented against her, nor connected by averment with the original cause of action; is not such a counter claim as is contemplated by the Code; nor such as would authorize a judgment, as upon an original proceeding against the heirs at law. The heirs at law demurred to the counter claim against them, and resisted a judgment thereon, and for the reasons stated, we are of opinion the demurer should have been sustained, and the appellee required to proceed in a separate action against them and the administrators upon the warranty. They were not plaintiffs in the original action, and there was properly no counter demand against them.

With regard to the consideration of the deed, we deem it sufficient to say, that the proof of the alleged illegality, is not such as effects Mrs. Golden's right to recover upon the warranty, in an appropriate proceeding had for that purpose.

Wherefore, the judgment upon the original petition allotting dower to Mrs. Hill *is affirmed*, and upon the appeal therefrom, the appellee is entitled to her costs; but the judgment upon the counter claim *is reversed*,

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and cause remanded, with directions to the Circuit Court, to sustain the demurrer of the appellants to the counter claim of the appellee as against them, and permit her to amend the same if she desires; or to cause the counter claim to be stricken out of the answer, and made the subject of a separate action.

Case 26.

Cook vs. Boyd.

ORD. PET.

APPEAL FROM MONTGOMERY CIRCUIT.

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Boyd sued out an attachment against Bruce, and placed it in the hands of the sheriff. Bruce tendered to the sheriff his bond, to abide and perform the judgment of the court, with Hanley as surety.—The sheriff not being willing to take the surety, Bruce procured Cook to sign the bond, also. Hanley was released on *non est factum*: held that though the attachment had not been levied, the bond was binding on Cook as a common law bond.

The facts of the case are stated in the opinion of the court.—*Rep.*

R. Apperson for appellant—

The bond sued on was presented to Cook, with the name of Bruce as principal, and Hanley as surety. The sheriff having the attachment in his hands, was not willing to accept Hanley alone, as surety; Cook then signed as a joint surety for Bruce. Hanley was released on the plea of *non est factum*. It is insisted that Cook is not bound; to bind him, will be imposing upon him a greater liability than he intended to incur, when he signed the bond. *In Chitty on Contracts, last edition, page 528*, it is said: "If a person sign a promissory note as surety, upon the representation that another person would also become a party to it as surety, no liability would be incurred by the former to the payee, if the other proposed surety

refused to join in the instrument; unless the objections were expressly waived by the former, who signed it." (See also, *Leif. vs. Gibbs*, 4 C. and P. (166.) The case put by Chitty is not so strong as this case; here the name of Hanley was to the obligation, when it was presented to Cook by the sheriff, whose duty it was to take the bond. He signed, supposing he was co-surety with Hanley. In this transaction, the sheriff acted as the agent of the plaintiff. Whether the sheriff knew whether or not Hanley had signed the bond is not material.

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H. Daniel on the same side—

It does not appear that the sheriff ever levied the attachment of *Boyd vs. Bruce*. If he did not, he had no right to take the bond. (*Code of Practice*, 235, 6, 7, 8.)

By sec. 232, *Code of Practice*, the sheriff is directed to "return on every order of attachment what he has done under it." The return must show the property attached, the time it was attached; and the disposition made of it. The return of the sheriff on the attachment is in these words: "Executed on W. S. Bruce, and Lindsey & Dorsey, by giving each a true copy of the within writ of attachment. See bond enclosed."

Suppose the sheriff had returned that he could find no property on which to levy the attachment, and had taken and returned the bond sued on? Would it have been binding? Had the sheriff any right to take it, would it not have been without consideration and void? It is supposed it would. Cook never intended to be bound alone, but jointly with Hanley; and it will be hard to compel him to meet a responsibility he did not intend to incur.

Chiles for appellee—

It is said by counsel for appellant, that the bond taken by the sheriff was unauthorized, and therefore not obligatory on Cook, the surety; and the *Code of*

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Practice, sec. 235, 6, 7, 8, are cited. But by a reference to sec. 242, this language will be found: "If the defendant at any time before judgment, causes a bond to be executed to the plaintiff, by one or more sufficient sureties, to be approved by the court, to the effect that the defendant shall perform the judgment of the court, the attachment shall be discharged, &c." The subsequent section, 243, reads as follows: "The bond mentioned in the last section, may in vacation be executed in the presence of the sheriff, having the order of attachment in his hands; or after the return of the order, before the clerk, with the same effect upon the attachment, as if executed in court. The sureties in either case to be approved by the officer."

The bond in this case was taken by the sheriff "in vacation;" he held the order of attachment; Bruce caused the bond to be executed to the plaintiff, with surety, in the penalty of \$400, with the condition that "Bruce shall perform the judgment of the court."

It could not be necessary to levy the attachment. The papers show that bond was given, attachment issued, and the bond of Bruce and Cook given, all the same day. Bruce chose to give the bond without the form of a levy, to abide the judgment of the court. The execution of the bond rendered a levy unnecessary. It cannot be essential to the obligatory force of the bond, that a formal levy should have been made.

Cook is estopped to deny a consideration, unless he show fraud or force in its obtention. (*Jones &c., vs. Prewitt, &c.*, 3 Marsh. 302; *Stevenson vs. Miller*, 2 Lit. 310; *Fitzhugh vs. Lyle*, 9 B. Monroe, 561; *McChord vs. Fisher's heirs*, 13, B. Monroe, 195.)

The sheriff was not the agent of plaintiff in procuring the surety to sign; Bruce tendered the bonds and surety; the sheriff did not procure Cook to sign; it was Bruce. No reason is perceived why the case should not be affirmed.

Judge CRENSHAW delivered the opinion of the Court.

Whether the attachment, under which the bond in this case was taken, had been levied or not, it was in the hands of the sheriff, and the obligors in the bond had a right to regard it as levied, or to dispense with its levy, and to execute a bond to the plaintiff to pay the debt, in order to prevent a levy. A bond thus to be executed, does not seem to be within the contemplation of the constructors of the Code of Practice. But, although it was not executed in pursuance, and in accordance with the provisions of the Code, there not appearing to have been any levy of the attachment, the obligors, Cook and Bruce at least, saw proper to execute it, and thereby prevent a levy; and it is a good common law bond, and obligatory upon the defendant, Cook, unless he can be exonerated by the matter set up in his defence.

His defence, we think, cannot avail him. The names of Bruce and Hanley had been signed to the bond, when it was presented to him for his signature; and he may have supposed that the sheriff had discharged his duty, in being present, and in seeing that the name of Hanley had been properly placed to the bond; but, if deceived in this respect, it was not at the instance, nor was it the fault of the plaintiff. Nor should the sheriff, in our opinion, be regarded as the agent of the plaintiff in taking the bond, so as to render the plaintiff responsible for the neglect of duty on the part of the sheriff. The sheriff was the officer of the law, to whom the plaintiff was bound to entrust the execution of his attachment, and, after the delivery of the attachment into his hands to be levied, the plaintiff concerned himself no further with it, trusting to the officer whom the law had appointed for the purpose, to discharge his duties, and to execute his attachment. The sheriff, instead of making a levy in obedience to the command of the writ, suffered the defendant therein to execute a bond with surety to pay the debt. This bond was not executed at the instance of the plaintiff, but at the

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Boyd sued out an attachment against Bruce, and placed it in the hands of the sheriff; Bruce tendered to the sheriff his bond, to abide & perform the judgment of the court with Hanley as surety; the sheriff not being willing to take the surety, Bruce procured Cook to sign the bond also; Hanley was released on *non est factum*: Held, that though the attachment had not been levied, the bond was binding on Cook as a common law bond.

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instance of Bruce, the defendant in the attachment, with whom Cook united as surety. The sheriff in this instance, was rather the agent of the obligors in the bond, than the agent of the plaintiff. The bond was executed at the instance of Bruce, and for his relief from the attachment; and it was at his instance that Cook became an obligor therein.— Under such circumstances, we do not think it right that the plaintiff should be prevented from looking to the bond for indemnity, and be turned round to an action against the sheriff, for any supposed breach of duty on his part; but rather, that the defendant, Cook, if deceived and injured by a neglect of duty by the sheriff, should seek redress from him. Besides, although Cook alleges that he signed the bond because the name of Hanley was to it, and states that he would not have done so, but upon the supposition that Hanley's name was rightfully subscribed, he offers no proof whatever that the name of Hanley was worth anything. Hanley may have been worth little or nothing; at any rate, the sheriff esteemed him insufficient surety for \$400.

The principle mentioned in Chitty on Contracts, to which we have been referred by counsel, is not very definitely stated, and does not, we apprehend, apply to the facts of this case. If any assurances are held out by the obligor in a bond or note, to one whose signature he is about to procure, that others are also to sign the same; or, if the obligor present to him a note or bond with the signature of others, upon the faith of which he also signs the same, and these assurances are violated, or, the signatures already to the instrument are not genuine, the principle mentioned might be applied with some propriety.— But, in a case like this, where the obligor has done nothing to deceive the party, we do not think the principle ought to be applied.

Wherefore the judgment is affirmed.

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Fitzpatrick vs. Harris.

Case 27.

APPEAL FROM FLOYD CIRCUIT.

PRT. EQ.

1. To constitute a sufficient ground for a new trial, because of a juror having served on a jury in the same suit, and found a verdict against the party, it must appear that the fact was unknown to the party when the juror was accepted, and until it was too late to make it known before the jury retired. It is the duty of the parties to look to the record of a former trial for such facts.
2. A plaintiff collected a part of a judgment recovered for assault and battery, which judgment was reversed. When the plaintiff gave his obligation and surety to refund the amount collected in case he should not recover that amount on a second trial. On the second trial the surety was offered as a witness, and objected to—objection sustained. Plaintiff offered other surety—objected to and objection sustained. Money deposited to the extent of the liability of surety. Held that his competency was thereby restored.

Harris brought an action for assault and battery against Fitzpatrick, and recovered a judgment for \$152 in damages. Fitzpatrick brought the case to the court of appeals, and it was reversed. Whilst the case was in the court of appeals, Harris sued out execution on his judgment and sold property to the amount of \$65—part of which defendant bought on credit and had not paid. Upon the return of the case, Fitzpatrick being about to move for restitution of the amount so collected, it was agreed by the parties that Harris should give his bond, with J. M. Elliott surety, to refund the sum collected, if Harris should fail to recover that amount on the second trial. Upon the second trial Harris offered J. M. Elliott as a witness, and he was objected to because of his interest. Harris then offered other security instead of Elliott. The court refused to permit that to be done. Harris then deposited in court \$40, which was ascertained to be the sum which Harris should refund in case he failed, &c. A trial was had, Elliott was admitted to testify, and Harris recovered a

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judgment for \$200 in damages. A new trial was asked upon the ground that Elliott had been improperly admitted to testify, and that one of the jurors who sat on the last trial had also sat on the first trial, and that the court erred in its instructions to the jury given at the instance of the plaintiff. The motion for new trial being overruled, the defendant has appealed to this court.

W. H. Burns for appellant—

1. The circuit court erred in admitting the testimony of J. M. Elliott. He was interested in enhancing the recovery of Harris to an amount at least equal to the sum collected on the first judgment.—The giving of the bond was an act of the parties; it was their agreement, which the court had no power to change, or in any way to release Elliott. It was not a judicial bond, such as is contemplated by the *Revised Statutes*, chap. 107. Elliott could not be released without the consent of Fitzpatrick.

2. The sum deposited was insufficient; \$65 had been collected on the reversed judgment; only \$40 was deposited. This was not sufficient.

3. S. Salyers, who was one of the jurors on the first trial, was also a juror upon the last trial, of which the defendant was not informed, or did not remember at or during the second trial, and therefore did not challenge him. It is now, under the circumstances, good cause for a new trial. (*McKinley vs. Smith*, *Hard.*, 167; *Pierce vs. Bush*, 3 *Bibb*, 347; *Herndon vs. Bradshaw*, 4 *Bibb.*, 45; *Vance vs. Haslet*, *Ib.*, 191; *Cain vs. Cain*, 1 *B. Monroe*, 214.) The case of *Craig vs. Elliott*, 4 *Bibb.*, 272, decides that the ground is not sufficient if the party discover it in time to avail himself of the challenge. It was not discovered in this case, as the affidavit shows.

4. The instructions of the court are erroneous and confused, filled with abstractions, and misleading and embarrassing to the jury.

R. Apperson and G. Pearl for appellee—

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1. There was no error in permitting Elliott to testify. If he was incompetent by reason of his being the surety of Harris, he could be properly released under the provision of the *Rev. Stat.*, p. 70. But if we are in error in this, there can be no doubt that the witness was made competent when the money, for which he might have been made liable on the bond, was deposited in court. Forty dollars was the sum which the court said was the liability on the bond in any event.

2. No distinct and tangible objection is made to the instructions given for plaintiff. It is believed they contain substantially the law of the case.

3. The defendant has not shown the exercise of that vigilance in the selection of the jury which it was his duty to exercise, nor has he shown that the fact that Salyers served on the former jury was not known to his counsel, nor at what stage of the trial it was discovered. The record of the former trial was there; it was his duty to consult it.

Chief Justice MARSHALL delivered the opinion of the Court.

The instructions in this case, though some of those given on behalf of the plaintiff are longer and more minute in detail than necessary, conform substantially to the principles of the former opinion, and seem to embody them. There was no error in giving them as asked.

Though the affidavit of the defendant states that he did not know, until after he was accepted, that Salyers, who was one of the jury on the last trial, had been one of the jury on the former trial, (when a verdict was found for the plaintiff,) it is not a sufficient ground for a new trial. The objection might have been made at any time before the juror was sworn, and, as we think, at any time before the entire jury was sworn, and the fact should have been made known as soon as discovered, at any time before the jury retired, when it might have been in the

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1. To constitute a sufficient ground for a new trial, because of a juror having served on a jury in the same suit, and found a verdict against the party, it must appear that the fact was unknown to the party when the juror was accepted, and until it was too late to make it known before the jury retired. It is the duty of the party to look to the record of a former trial for such facts.

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power of the parties to cure or waive the objection. Besides, the record of the former trial furnished to the parties and their counsel the means of knowing the names of the jurors who had then tried the case, and even if they were not personally known, the identity of name would suggest the probable identity of the person; and even without the trouble of examining the record, the fact that there had been a previous trial, authorized, and should have suggested, the question to be asked of the juror himself, whether he had been one of the former jury. With such opportunities of ascertaining the fact, the failure to disclose it until it is made the ground of asking a new trial, raises a presumption of bad faith, or of willful neglect, which can only be overcome by showing such extraordinary circumstances, if there can be any such, as will account for ignorance where the party ought to have knowledge, and excuse neglect where he is bound to be diligent. In this case the affidavit of Salyers proves that he and the defendant were familiar acquaintances and friends.— And thus the circumstances strengthen instead of repelling the unfavorable presumptions in the case. And we may add, that even if the defendant himself were ignorant, it is not shown that his counsel, who conducted the defense, did not know the fact now brought forward, nor, if they were ignorant of it, is any reason shown for their neglecting the means of knowledge so easily within their power. The affidavit, therefore, makes out no ground for a new trial.

2. A plaintiff collected a part of a judgment recovered for assault and battery, which judgment was reversed, when the plaintiff gave his obligation with surety, to refund the amount collected in case he should

We are of opinion, further, that no error was committed in overruling the objections to the competency of J. M. Elliott, offered as a witness for the plaintiff. It seems that upon the first judgment in this action the plaintiff had, before its reversal, caused execution to issue, on which two tracts of land and a horse had been sold for about \$65, and the net proceeds of the sales had been credited on the execution. After the mandate of this court, directing a new trial, was entered, the defendant, instead of moving for restitu-

tion, took a bond from the plaintiff, with said Elliott, and another, as sureties, to secure such repayment as might be ordered by the court. This obligation made the sureties interested in the event of this suit, to the extent that the plaintiff might be bound to return what he had recovered under the reversed judgment. If he should recover damages beyond the amount received, he and his sureties would be under no liability on the bond. The bond having, as it seems, been the result of agreement between the parties, the court properly refused to permit the plaintiff, against the consent of the defendant, to substitute it by a new bond with other sureties, in discharge of Elliott's liability, and as a means of restoring his competency. But there was no error in allowing the plaintiff to deposit in court a sufficient sum of money in discharge of the undertaking of the plaintiff and his sureties, which seems to have been entered upon the record. The deposit of such sum would be, and was a complete discharge of the bond, and as it removed entirely the liability of the sureties, and their consequent interest in the result of the suit, it made each and either of them competent to testify on either side. The sum deposited, and to which this effect was given, was \$40, which being not quite two-thirds of what had been returned as made on the executions, seemed at first not to be a sufficient sum. But on examining the returns on the executions, we find that the horse was purchased by the plaintiff at the price of \$30, and the two tracts of land were purchased by the defendant himself at the price of about \$35, for which he executed sale bonds. But it does not appear that any part of these bonds had been paid before the reversal of the judgment. And as the sales were made in the early part of the year 1852, and the mandate of reversal was entered in October of the same year, payment is not to be presumed in favor of the party objecting to the witness, upon whom it was incumbent to show his interest and incompetency. In this aspect of the case the sum of

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not recover that amount on a second trial. On the second trial the surety was offered as a witness, and objected to; objection sustained; plaintiff offered other surety; objected to, and objection sustained.—Money deposited to the extent of the liability of surety: Held, that his competency was thereby restored.

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\$40 seems to be sufficient to cover any liability which the plaintiff and his sureties might incur under the bond or recognizance above stated, even if the plaintiff were defeated in the present action. And if the defendant's liability on his sale bond might be affected by that event, the plaintiff's sureties have no interest in that matter. There was no error, therefore, in admitting Elliott as a witness after the deposit of \$40 in lieu of the bond in which he was surety. But that sum, being in place of the bond, should not have been allowed to be withdrawn by the defendant, and especially after a second judgment had been obtained against him, and a new trial refused, and an appeal prayed. In that state of the case he would not have been entitled to restitution if there had been no bond, but the question of restitution, on which the right to this \$40, or any part of it, depends, would have been suspended until the decision of the case in this court. To place the parties in their proper position in case of an affirmance, if the sale bonds of defendant have not been paid, the credits on the previous executions should be stricken out, and the defendant ordered to restore to the plaintiff any excess of the sum of \$40 above the sum bid by him for the horse, with the interest from the time it was due according to the terms of sale. But if the plaintiff received on the executions a sum which, with its interest, exceeds the sum of \$40, the excess should be credited on the present judgment, which, as there is no error in the proceedings prejudicial to the defendant, is therefore affirmed.

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Parker vs. Patrick.

Case 28.

APPEAL FROM WHITLEY CIRCUIT.

CAVEAT.

1. By the act of 1815, a survey under a Kentucky land warrant is the commencement of the title. The filing of the warrant with the surveyor, gives no right to any specific land, until regular application to the surveyor for a survey thereof.
2. The act of 1831, gave a pre-emption right to actual settlers, to any land which they had improved or cultivated, or enclosed, and was in their actual possession, use, or occupation. The subsequent act of 1835, gave no pre-emption to mere settlers on vacant land, without any claim or color of title, and vested all the vacant land in the county courts. By the act of 1839 to amend the act of 1831, a pre-emptive right is given to any actual settler upon any vacant land, subject to the limitations and conditions of the laws then in force, to any number of acres, not exceeding one hundred, to include the improvement; to be laid off in a square as near as may be. ((3, *Stat. Law*, 385.) Two classes of settlers are recognized by the statutes; the one holding under color of title, deed or bond for title, the other without color of title. A settler upon land previously surveyed, has no preemptive right under either of the statutes referred to.
3. The survey by the act of 1815, being the commencement of the title, it seems that the party is entitled to the land surveyed, whether it conform to the entry or not.

The facts of the case are stated in the opinion of the court. *Rep.*

Granvil Pearl for appellant—

The appellant was an actual settler upon the land in contest, before the survey of the appellee was made, and no notice was given by appellee to appellant of his design to appropriate the land as required by the statutes. Moreover, there was an agreement between Moses from whom Patrick purchased the warrant, before he made the purchase and after his entry, that the survey should not come farther than the Flat Ridge; and Patrick violated this agreement, and moved the entry from Bear Creek; and placed it on the land in contest, and appropriated 388 acres under a warrant for only 300 acres; and by doing so, prevented appellant from securing 100 acres in a square around his residence, as allowed by the statutes.

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The appropriation of the vacant lands by the act of 1835, to the county courts, could not interfere with any of the vested rights of any settler; and the act of 1839, was within the power of the legislature, so far, as no right had become vested under the act of 1835, under warrants from the county court. The act of 1839, in express terms protects the settler in his pre-emption right, subject to the limitations, and conditions then in force. (*Sess. Acts*, 311; 3 *Stat. Law*, 385.)

The act of 1839, invited settlers, though without color of title; many poor men have embraced the offer, and should be protected in their homes, which is their all.

January 17.

Judge SIMPSON delivered the opinion of the Court.

The appellant entered a caveat, contesting the right of the appellee to a patent on a survey of three hundred acres of land, in the county of Whitley.—He claimed a right to the land, superior to that of the appellee, on two grounds. First, a prior entry with the surveyor of the warrant under which he asserted title. Second, a pre-emption right as an actual settler, to the land in controversy.

1. The validity of the first ground, depends upon the construction of the statutes relating to this subject. The act of 1837, (3 *Stat. Law*, 388,) prescribes the mode in which a warrant is to be obtained from the clerk of the county court, and provides, that "on the production of the warrant to the surveyor of the county, he shall proceed and survey the same, and do all and every act, which he was required to do in the case of treasury warrants, before the passage of the act of 1835."

Under the act of 1815, (2 *Stat. Law*, 1019,) the proprietor of a warrant, upon lodging it with a surveyor of a county, has a right to have one or more surveys executed thereon, upon any waste or unappropriated lands, which he or his agent might point out, or show for that purpose. The applications for such surveys,

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were required to be made at the office of the county surveyor, and it was his duty to enter in a book to be kept by him, the date of the application when made, with the number of the warrant, and the number of acres expressed in it, and the name of the person or persons for whom the application was made. And it was also his duty when he proceeded to make the survey so applied for, to pay the strictest attention to the seniority of the application, surveying those first which were first applied for. This was the law that regulated the duty of surveyors with respect to treasury warrants, at the time of the passage of the act of 1835, (3 *Stat. Law*, 386,) which vested all the vacant and unappropriated land in this commonwealth, north and east of the Tennessee river, in the county courts of the respective counties, for the purposes of internal improvement.

The warrant under which the plaintiff claimed was lodged with the surveyor of the county, before the one under which the defendant had his survey made was lodged with him. One or more surveys had been made under the plaintiff's warrant, prior to the year 1843. No subsequent application for a survey thereon, seems ever to have been made at the office of the county surveyor as required by law, although the whole quantity of land specified in the warrant, had not been appropriated by the previous surveys.

The warrant under which the defendant had his survey executed, was lodged in the office of the county surveyor in December 1846, but his survey was made before the survey under which the plaintiff claims was executed.

The act of 1815, before referred to, declares that the actual survey shall be the commencement of the title. The warrant does not give to the proprietor a right to any specific land, nor is such a right created by the mere act of lodging it with the surveyor of the county. As the plaintiff did not prove that he had made an application for a survey in the mode

1. By the act of 1815, a survey under a Kentucky land warrant is the commencement of the title. The filing of the warrant with the surveyor gives no right to any

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specific land,
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survey thereof.

prescribed by law, at any time before the defendant had his survey executed, it is not deemed necessary to decide whether such an application, if made, would have given him a prior right to the land. The statute makes it the duty of the surveyor to execute the surveys in the order in which they may have been applied for, and it would certainly be a violation of duty on his part, to disregard this requisition of the law; and it may be, were he to do so, that it might authorize the prior applicant to enter a caveat, to prevent the owner of the survey thus improperly made by the surveyor, from carrying it into grant.— But as before remarked, it is not necessary to decide this question in this case, inasmuch as the plaintiff did not make a legal application for a survey, before the defendant's survey had been executed; and the fact that the warrant under which he claimed, had been lodged with the surveyor, imposed no duty on the latter to make a survey thereon, until an application to do it had been regularly entered, nor gave a right of priority of any kind to the owner of the warrant.

2. The act of 1831 gave a pre-emptive right to actual settlers to any land which they had improved, or cultivated, or enclosed, and was in their actual possession, use, or occupation. The subsequent act of 1835 gave no preemption to mere settlers on vacant land, without any claim or color of title, and vested all the vacant land in the county courts. By the act of 1839 to amend the act of 1831, a pre-emptive right is

2. By the act of 1835, before referred to, all the lands that were vacant and unappropriated on the first day of August, 1835, within the boundary therein specified, were vested in the county courts of the respective counties. The only reservation in the act in favor of actual settlers, was that contained in the fourth section thereof, which applies alone to such settlers as have either a deed or bond for the land on which they reside.

At the time of the passage of this act, the act of 1831, which allowed a pre-emptive right to actual settlers to such land as had been improved, or cultivated, or enclosed by them, or was in their actual use or occupation, was the only law in force in favor of actual settlers. As the act of 1835 made no reservation in favor of mere settlers on vacant land, without any claim or color of title, and vested all the vacant and unappropriated land in the county courts,

it might be a serious question, whether this act did not operate as a virtual repeal of the act of 1831 on this subject. However, it appears that the legislature in the year 1839, passed an act to amend the act of 1831, by which, it was enacted "that the actual settler on any vacant and unappropriated land in this commonwealth, shall have a pre-emption right, subject to the limitations and conditions of the laws now in force, to any number of acres of said land, not exceeding one hundred, which shall be laid off so as to include his improvement, and as nearly as may be in a square." (3 vol. Stat. Laws, 385.)

From this it appears that the legislature did not consider the act of 1831 as repealed by the act of 1835, but intended to make provision for a different class of persons, and consequently that there are two classes of actual settlers, who are entitled under these different enactments, to pre-emption rights on vacant land; one embracing such persons as have settled thereon under color of title, the other such persons as are mere settlers, without any color of title whatever.

The appellant does not belong to the first class, having exhibited neither a deed or bond for the land, and therefore is not embraced by the act of 1835.

Nor can he claim a pre-emption right under the act of 1839, because the land upon which he settled, and upon which all his improvements are situated, had been previously appropriated, by a survey made in the name of Meadows; so that he was not in fact an actual settler upon vacant and unappropriated land. It is true that the survey of Meadows covers only fifty acres of land, and that if the appellant has a pre-emption right to one hundred acres, it would extend beyond this survey, and embrace part of the land covered by the defendant's survey. But having settled upon land that was appropriated, he has not acquired a pre-emption right by such settlement, and consequently has no valid claim to any of the land within the defendant's survey.

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given to any actual settler upon any vacant land, subject to the limitations and conditions of the laws then in force, to any number of acres not exceeding 100, to include the improvement to be laid off in a square as near as may be. (3 Statute Law, 385.) Two classes of settlers are recognized by the statutes, the one holding under color of title, deed, or bond for title; the other without color of title. A settler upon land previously surveyed, has no preemptive right under either of the statutes referred to.

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3. The survey by the act of 1815 being the commencement of the title, it seems that the party is entitled to the land surveyed, whether it conform to the entry or not.

As the plaintiff in a case of this kind is not entitled to any relief, unless he shows some right to the land in himself, the objection he makes to the defendant's survey, because it does not embrace the same land described in the entry made by the surveyor, need not be considered. We would however remark, that the survey is the commencement of the title under the act of 1815, which act does not seem to contemplate the appropriation of the land by an entry, but requires the surveyor to survey for the proprietor of the warrant, any waste or unappropriated lands which he may point out or show for the purpose. And as the defendant has the oldest survey, and a specific right to the land which it embraces, from the time it was executed, except to that part of it which conflicts with the survey of Meadows, and the plaintiff has not established a better right to any part of the land, his caveat cannot be sustained.

Wherefore, the judgment of the court below, dismissing the plaintiff's caveat, is affirmed.

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Case 29.

APPEAL FROM MERCER CIRCUIT.

ORD. PET.

1. A delivery of a note, indorsed in blank, vests the holder with the right to receive the money thereon—to negotiate and fill up the assignment in general term. (*Cope vs. Daniel*, 9 *Dana*, 416.)—So if the delivery be by an agent of the owner. —(*Story on Prom. Notes*, 150; *Bayley on Bills*, 123-4.)
2. Any holder of a bill, with indorsement in blank, who receives it in good faith, for a valuable consideration, is authorized to receive the amount, though it may have been lost, stolen, or fraudulently misapplied. (*Story on Prom. Notes*, 148; *Same on Bills*, 207; *Chitty on Bills*, 277.) The rule caveat emptor does not apply to those purchasing such bills or notes.

J. M. Thompson & Brothers being indebted to Caruth, &c., about \$700, their note was placed in the

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hands of Handy for collection, who took of the Thompsons sundry notes on other persons, indorsed in blank by the Thompsons; amongst others a note on C. C. Vanarsdale for \$117 41; before the assignment was filled up, Handy, the agent of Caruth, &c., handed it back to one of the Thompsons who had passed it to him, in order to have it secured; Thompson sold the note to Jones; Caruth, &c., brought this suit against Jones, Vanarsdale, &c., to recover the note or its amount, and failing to do so, have appealed to this court.

J. D. Hardin for appellants—

Argued: 1. That although, whilst the notes were in the hands of the agent, the indorsement might have been filled up, and suit brought in the name of the holder, yet, as it was not done, an equity passed to the appellants. And by handing over the notes to Thompson to have them secured, that equity was not divested; and though Jones may have paid Thompson for the notes, he had no right to sell them, and could pass no title; and Jones had notice of the claim of appellants, and want of authority in Thompson to sell the notes, before any assignment was in fact made, and requested to surrender them to the agent.

2. That the equity of the appellants, by the passing of the notes to Handy, their agent, is elder than that of Jones; and Jones had notice of that equity before he had any legal assignment of the notes, and therefore the appellants should prevail.

Trapnall for appellee—

The record shows that Thompson & Brothers practiced a fraud upon the appellants. They first sold the note to appellants with their indorsement, and delivered it to their agent; subsequently the note was placed in the hands of J. M. Thompson, one of the firm, for the purpose stated in the petition; whilst so in his possession, for a valuable considera-

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tion, he passed it to the appellee, Jones, with the same indorsement not yet filled up, Jones having no notice of appellants' claim to it.

1. A note indorsed in blank must have the assignment filled up before it can have a legal operation. (*Snyder vs. Satterly*, 1 Penn., 87; *Menard vs. Wilkerson*, 3 Miss., 92; *Bradford vs. Ross*, 3 Bibb, 238.)

2. "When the same right of action is successively sold or mortgaged to two persons, as the title of both is a mere equity, that of the first will be preferred, unless he has been guilty of some laches which has enabled the assignor or mortgagor to practice a deceit on the second; when such is the case, the loss must fall upon the guilty party in case of the innocent purchases." (*White vs. Tudor*, *Lead. cases in Eq.*, vol. 2, part 2, p. 234.)

3. A subsequent equity, acquired on valuable consideration, without notice, will overreach a prior equity. (*Lyne & Co. vs. Bank Ky.*, 5 J. J. Marshall, 565.)

W. A. Hooe on the same side—

1. Jones, the appellee, purchased the note in contest of one of the payees, with the name of the firm indorsed thereon, without any intimation that it had ever been in the hands of another. The note passed by delivery, and the right of Jones is the better right to the money due upon the note. 1. Because Jones is an innocent purchaser of the note, without any notice of the claim of appellants. 2. Because it was the duty of the appellants' agent to have filled up the indorsement to himself or his principal, thereby giving notice that they claimed a property therein; failing to do so, and placing it in the hands of J. M. Thompson, he gave him authority to pass it to any person who might desire to purchase it, and the appellants should not now take advantage of their own wrong, by which they enabled Thompson to impose upon the appellee, Jones. (3 *Litt.*, 371; 3 *Bibb*,

278, and 312; 2 *Marsh.*, 67; 4 *Bibb*, 196; 1 *Marsh.*, 58; 10 *B. Mon.* 186.)

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2. The plaintiffs having confided their business to Handy, and he confided to Thompson, the plaintiffs have no claim against Jones for the indiscretion of the agent.

3. A court of equity had no jurisdiction of the subject. If the chancellor decides that plaintiffs are entitled to the note, they must sue by ordinary petition to recover it.

Judge STILES delivered the opinion of the Court.

Although the delivery of the notes, with a blank indorsement thereon, by Thompson to appellants' agent, may not, of itself, have vested them with the legal title thereto, it did invest them with a right to receive the amount thereof, to negotiate them, and with authority to complete the evidence of such legal title by filling up the blanks with a formal assignment to themselves. (*Cope vs. Daniel*, 9 *Dana*, 416.)

The re-delivery of the notes in contest, by the agent, with the blanks still unfilled, to Thompson, the payee, or to any one else, had the same effect as to such person, and conferred the same right to negotiate, collect or otherwise dispose of the notes.—(*Story on Prom. Notes*, 150; *Bayley on Bills*, 123–124.) It was not a full endorsement, mentioning the name of the party in whose favor it is made, and vesting him alone with power to negotiate or collect the paper, but a blank transfer, enabling the holder to fill up to himself, or pass the instrument to another by mere delivery.

One of the consequences resulting from this power to pass a bill or note with a blank indorsement, by mere delivery, is, that if such bill, or note, be lost or stolen, or fraudulently misapplied, any person who may become the holder of it in good faith, for value, and without notice, is entitled to recover the amount thereof, and hold the same against the rights of the

January 19.

1. A delivery of a note, indorsed in blanks, vests the holder with the right to receive the money thereon, to negotiate and fill up the assignment in general terms. (*Cope vs. Daniel*, 9 *Dana*, 416.) So if the delivery be by an agent of the owner. (*Story on Prom.*, note 150; *Bayley on Bills*, 123–4.)

2. Any holder of a bill, with indorsement in blank, who receives it in good faith for a valuable consideration, is authorized to receive the amount, though it may have been

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fraudulently
misapplied.—
(*Story on Prom.*,
note 148; *Same*
on Bills, 207;
Chitty on Bills,
277.) The rule,
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does not apply
to those purchas-
ing such bills or
notes.

true owner at the time of the loss or theft. (*Story on Prom. Notes*, 148; *Chitty on Bills*, 277; *Story on Bills*, 207.)

The principle is founded upon necessity, growing out of the peculiar character of notes and bills of exchange, constituting, as they do, in an important degree, a circulating medium of commerce. The adoption of any other rule, or the application of the principle of *caveat emptor* to persons thus honestly acquiring such paper, would necessarily tend to impair confidence in that species of commercial securities, and diminish greatly its usefulness for purposes of trade.

Here Jones, who obtained the note from Thompson, the bailee of appellants, occupies, so far as the record speaks, the attitude of a purchaser in good faith, for a valuable consideration, and without notice of their rights. He is entitled, as such, to sue for and recover the note thus acquired, and the bill of appellants, as to him, was rightfully dismissed. They, and not an innocent purchaser, must suffer from the perfidy of their agent.

As to Burks, and William H. Vanarsdale, the case should have been retained. Although the petition, as presented, did not authorize a judgment against them for the amount of their notes, it authorized the injunction prohibiting them from paying until it could be ascertained in whose hands they were. If the notes were in the hands of an innocent purchaser, or if they had paid them innocently to Thompson, of course appellants were not entitled to relief, but otherwise they were. They did not answer the petition, and, as the case stood, the chancellor should have required appellants so to amend their petition, by appropriate allegations, as to compel an answer from them as to the whereabouts or existence of the notes, or authorize a judgment for the amount, upon indemnifying them against another action therefor, or, upon their failure so to do, dismissed their petition without prejudice.

Wherefore, as to the appellees Jones and Cornelius Vanarsdale, the judgment is *affirmed*; but it is *reversed* as to the other defendants, and cause remanded for further proceedings consistent herewith.

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Case 30.

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APPEAL FROM MEADE CIRCUIT.

ORD. PET.

1. At common law the principal was not liable for the willful trespass of his agent; but he was responsible for injuries arising from the carelessness, negligence or want of skill of the agent while in the performance of the business of the principal.
2. Since the adoption of the Revised Statutes, the owners of steamboats, or other vessels, are liable as well for the willful as the negligent conduct of the officers and crew; and an action for such injury can now be maintained against the owners as well as the commander, without any allegation of carelessness or unskillfulness.
3. A petition asking redress for an injury arising from negligence or want of skill in the performance of a lawful act, should state such facts as would have authorized an action on the case; and a petition claiming redress for an injury done with force, such facts as would have authorized the action of trespass.
4. The owners of a steamboat, sued by the general appellation, are not parties to a suit, unless designated by name, and served with process actually or constructively.
5. Juries are authorized to give exemplary damages in cases of wanton and reckless negligence, as well as for forcible injuries; and it is not error for the court in such cases so to instruct the jury.

The facts of the case are stated in the opinion of the Court. *Rep.*

Riley & Muir and *G. A. & I. Caldwell* for appellants—

Argued: 1. That no sufficient cause of action was set out either in the first or second paragraph of plaintiffs' petition.

It is not alledged or proved that either of the owners of the steamboat was present when the collision

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with the wharfboat is alledged to have occurred. The fact is important in one view of the case.

The plaintiffs do not alledge that the collision occurred through the willful negligence or incompetency of the captain, or any of the officers or crew of the steamboat. If the owners of the boat are liable at all, it must be for the acts of their agents, the captain, officers, or crew. There are some acts of an agent for which the principal is responsible, and some for which he is not responsible. If the act is wantonly, spitefully, maliciously, or willfully done, the principal is not responsible. If the agent is incompetent, or performs his duty so negligently that an injury accrues to another, or if the manner in which the act is performed, though lawful, produces an injury to another, the principal is responsible.

The Code does not give a cause of action where none existed before its adoption. In the absence of any charge of neglect of duty, or incompetency in the discharge of that duty, we deny the liability of the principal.

The Code (*section 46*) authorizes suit against the owners of steamboats without naming them, "for an injury to another boat or craft, or for a trespass of its officers or crew, and in which no relief is sought beyond the subjection of the boat or vessel to the satisfaction of the plaintiff's claim." This only changes the form of the action; or if it creates a new liability, that liability is clearly limited to the defendant's interest in the boat, to respond to the plaintiffs' remedy on attachment.

2. The judgment in this case is against the captain and owners of the steamboat for \$750, interest and costs, the amount of the verdict—not against the boat, but against the owners, by which any property they own is rendered liable. This judgment is not warranted either by the verdict or cause of action set out in the plaintiffs' petition. All the averments in the petition may be true, and yet the plaintiffs entitled to no recovery. And the proof does not show

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either a willful act, or culpable negligence, but an unavoidable accident incident to the navigation of the river.

The 2d section of the *Revised Statutes*, title "*Boats and Navigation*," p. 148, attempts to make the principal liable for the willful trespass of the agent. But the allegation of the facts necessary to show the right to apply the remedy are wanting in this case. The statute provides "that the steamboat and owner shall be liable to indemnify the party injured, for any damage *unlawfully* done by him to any other boat, vessel or river craft, or to any other property, through the wilful or negligent conduct of her officers or crew, whilst acting for her as such." None of the terms employed in the statute, or any equivalent terms, or conveying the same idea, are to be found in the petition. Nor are the averments sufficient to charge any person named as a defendant. The statute only gives the remedy against the owners of the steamboat when the act which occasions the injury was *willful*, or *negligently* done. This is not alledged.—And if such allegation had been made, the recovery could not have exceeded the actual damage done.

3. The plaintiffs did not undertake to prove the actual damage done, but obtained from the court an instruction to the jury that the jury might, in addition to the actual damage done, give such further damages as they might, in their discretion, find the circumstances of the case to justify. This is the old form of instruction in actions for trespass; but was it ever given in cases where the statute under which the proceeding was had limited the recovery to the damage which the plaintiff had actually sustained? Three fourths of this verdict is for smart-money.

We conclude that the petition contains no cause of action against the defendant; that the court misinstructed the jury, and erred in refusing the defendant's instructions offered; that the verdict is against the law and evidence—is excessive—and that the court erred in refusing a new trial.

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Walker & Stuart for appellees—

The demurrer to the petition was properly overruled. The petition contained a statement, in concise language, of the facts constituting the cause of action, which is all that the Code of Practice requires. It charged "that the steamboat, under command of the defendant, Kountz, was run against the plaintiffs' wharfboat, at the landing at Brandenburg, with great violence and force, to-wit, the force of the engines of said steamboat, and broke and sunk said wharfboat." And, in the amended petition, it is charged that the steamboat, under the command of defendant, Kountz, backed against the wharfboat, and the wharfboat was thereby broken and injured.

It is for the defendant to show that the collision was inevitable and unavoidable, otherwise the plaintiffs must recover on proof of the injury. It was not necessary for plaintiffs to prove the willfulness and forcible act, in terms—if it were necessary, it is implied in the averment that it was done willfully.

But whether the act from which the injury proceeded was willful or negligent, the same form of action lies in either case; and the only effect might be in the extent of recovery. The case stated is, briefly, that the defendant ran his boat against the plaintiffs' boat, which was cabled to the shore, and sunk it. Formerly it might have been necessary to distinguish between a willful and negligent collision—one in trespass, the other in case. These distinctions are abolished by the Code of Practice. The plaintiff is required to state facts which show a cause of action. The proof will show the circumstances attending, by which the recovery is to be regulated.

There was no error in refusing the instructions asked by defendant. They were misleading and properly rejected. And those given at the instance of plaintiffs were so evidently correct, that we suppose they will be not be assailed.

The verdict of the jury was fully justified by the proof, and the damages were not excessive. The

proof showed that it was a reckless and wanton destruction of the plaintiffs' property. And besides the actual expenditure necessary for repairs, much time and business was lost to plaintiffs. (See *Code of Practice*, sec. 369.)

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Judge CRENSHAW delivered the opinion of the Court.

January 25.

This is an action in ordinary, brought by Brown and Powell against Kountz, to recover damages for injuries done to their wharfboat, whilst lying in the Ohio river, at the wharf at Brandenburg, by the steamer Crystal Palace.

It appears that in March 1854, the steamer was descending the river, with a passenger on board whose destination was Brandenburg; that the commander was unwilling to land the passenger on the Kentucky shore, because the wind was then blowing hard from the north-west, rendering it difficult to land at Brandenburg; but the passenger insisting that he should be landed at the place to which he had taken his passage, and not be left on the Indiana shore, and it being the duty of the commander (Kountz,) to land him at Brandenburg, he accordingly did so. In doing this, the commander, as the testimony conduces to show, came up to the wharfboat as carefully as he could. Nevertheless, in coming up to the wharfboat, the steamer broke one of the knees, or fenders of the boat; and for this injury, the plaintiffs claim \$75 in damages.

In the month of May next after this injury, the steamer Crystal Palace had occasion again to land at Brandenburg, for the purpose of putting off a carpet-sack. The testimony is, that upon this occasion she landed between seventy-five and one hundred yards above the wharfboat, and that when backing out from the bank of the river, in order again to proceed on her voyage, she backed down opposite the wharf boat, and in turning her bow into the stream, her stern swung around and struck the

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wharfboat with considerable force, and broke and sunk her.

The petition was demurred to, and the demurrer was over-ruled; and it is still insisted that the petition shows no cause of action, and that the demurrer was improperly overruled. We concur in opinion with the circuit court.

1. At common law principal was not liable for the willful trespasses of his agent, but he was responsible for injuries arising from the carelessness, negligence, or want of skill of the agent while in the performance of the business of the principal.

Although the facts averred in the different paragraphs or counts of the petition are not very aptly stated, we think each paragraph or count contains a substantial cause of action, alledging an immediate and not a consequential injury, committed with force and violence, and the action under the old forms of pleadings would be denominated an action of trespass. And in this form of action, brought against the servant or agent, who caused the injury, it is not necessary to aver that the injury was willful, or was the result of carelessness or negligence, or want of skill. Upon common law principles, if the action in this case could be regarded as having been brought against the owners of the boat, as well as against their agent, who was the commander thereof, it ought to appear in the petition that the injury was caused by negligence or want of skill; as at common law the owners would not be held responsible for the willful acts of their agents forcibly committed. But this action cannot be properly considered as an action against the owners of the steamer, nor is it necessary since the adoption of the Revised Statutes to aver that the injury was committed thro' negligence or want of skill, even where the owners are sued.

2. Since the adoption of the Revised Statutes the owners of steamboats or other vessels are liable, as well for the willful, as the negligent conduct of the officers

By the 2nd section of chapter 7, page 143, of the *Revised Statutes*, the owners of a steamboat or other vessel are made liable for the *willful*, as well as the negligent conduct of her officers and crew, and hence an action for a forcible and willful injury can now be maintained against the owners as well as against the commander of the vessel, without any allegations of carelessness or unskillfulness on his part.

Before the Revised Statutes were adopted, as we have above intimated, no recovery could be had against the owners of a vessel for the trespasses and willful acts of the commander, but only for his acts committed through his want of skill, negligence, or carelessness. And the form of action against the owners, under our former system of pleading, would have been in case, and not in trespass, and it would have been proper and necessary to aver the injury to have been the result of the negligence or want of skill of their agent, the commander of the vessel. Averments of unskillfulness, or negligence, were necessary and usual in actions upon the case against the owners, but not in actions of trespass against their agent and commander of their vessel, because they were not responsible for his trespasses, but only for those injuries which resulted from his carelessness, or want of skill.

The author of an injury, forcibly committed by him, has ever been held responsible therefor, whether perpetrated in guiding a vessel which he is commanding or otherwise, and whether it were the result of willfulness, negligence, or accident, unless the injury may have been induced by the conduct of the party injured, or be in some way attributable to him as well as to the defendant. The injury which was committed in March, although done with force, may not subject the defendant to damages, because the wharfboat was fastened to the wharf at Brandenburg, that steamboats might run up to her for the purpose of discharging freight and passengers; and as steamers were, by common understanding, invited to come up to her for this purpose, it is no trespass to do so, but in doing it, their commanders should observe due and proper care in order to prevent injury; and if, notwithstanding the exercise of proper care and caution, damages are sustained by the wharfboat, it is a case of *damnum absque injuria*; or if the damages are the result of the improper conduct of the owners of the wharfboat, in having a boat too frail to

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and crew; and an action for such injury can now be maintained against the owners as well as the commander, without any allegation of carelessness or unskillfulness.

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3. A petition asking redress for an injury arising from negligence or want of skill in the performance of a lawful act, should state such facts as would have authorized an action on the case; and a petition claiming redress for an injury done with force, such facts as would have authorized the action of trespass.

answer the purpose intended or otherwise, and the commanders of steamers use due care and vigilance in approaching her, the wharfboat owners have no right to complain. But if proper care and vigilance are not observed, or the injury is willful, an action well lies.

Since the distinction between actions has been abolished by our Code, a petition which goes for a forcible injury should state such facts as would be equivalent to an action of trespass at common law. If the trespass be waived, and the petition go for negligence or want of skill, it should state facts which are equivalent to an action in case according to common law principles.

The doctrine applicable to this subject is ably discussed in the case of *Leume vs. Bray*, 3d East., 593. See the case and the authorities therein referred to, and also note (1.)

In the present case the wharfboat upon which the injury was inflicted, was stationary at the wharf at Brandenburg, and the doctrine in reference to the mutual conflict of vessels whilst under way upon the seas, or upon rivers, has no application. Nor are we to be understood as deciding that for an injury committed by one vessel upon another, in consequence of the force of wind and waves beyond the control, and baffling the skill and energies of the commander, he or the owners could be held responsible in any form of action. It is not necessary in this case to decide that question.

When the Crystal Palace came in contact with the wharfboat in March, the wind was blowing hard, and some difficulty was thereby encountered in approaching the wharfboat without injury thereto, but the testimony does not show that owing to the violence of the wind, due care and prudence forbade the commander from approaching her, or that the injury was the inevitable result of the high wind. If the wind was so high as to forbid a prudent commander from approaching the wharfboat at all, Kountz should be

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accountable for the injury inflicted at that time; if on the contrary the wind was not such as to forbid his doing so, and he approached her with that care and caution which the circumstances demanded, he ought not to be held accountable, as the wharfboat was there for the purpose of inducing steamers to approach her and discharge their freight and passengers.

Whether the approach was authorized at all under the state of the weather, or was made with due care and caution, was a question for the jury.

But, after the collision in March, a quarrel ensued between one of the owners of the wharfboat and Kountz, and he was forbidden to approach her, and he had determined not to do so. He had, therefore, when the second injury was inflicted, no right to approach her or come in contact with her at all, to her injury; and for doing so he is responsible.

The present is not an action against the steamer under our statutes, but is an action against Kountz, the commander, in person, and, as we think, against him alone. The owners are attempted to be made defendants, but it is only an attempt; they are not designated by name, but are only styled "owners," and they are not brought before the court by the service of process, actual or constructive. Kounts, therefore, is the only defendant in fact or in law, and the judgment must be regarded as a judgment against him only, although it is in terms against the defendants' in the plural. No judgment can properly be rendered, *in personam*, against persons not served with process, either actually or constructively. The judgment being, in legal estimation, a judgment against Kounts only; if right against him, it must stand; he is the only appellant, and rightly so.

Without discussing the instructions given to the jury at the instance of the plaintiffs, we think it clear that they are as favorable to the defendant as he has a right to ask.

4. The owners of a steamboat, sued by the general appellation, are not parties to a suit, unless designated by name, and served with process, actually or constructively.

5. Juries are authorized to give exemplary damages in cases of wanton and reckless

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negligence, as well as for forcible injuries; and it is not error for the court in such cases so to instruct the jury.

According to the principles of the foregoing opinion, they might, in reference to the last injury, inflicted where the wharfboat was sunk, have been stronger against him than they were. The third instruction is the only one which might seem liable to objection. But in actions for forcible injuries the general rule is, that the jury may give exemplary damages, and certainly they may be told that they can do so where the injury, in their opinion, may have been willful. It is not necessary to say whether the testimony was sufficient to authorize the conclusions that the injuries were committed willfully, for if they were recklessly committed, as the jury clearly had a right to infer in regard to the last and principal injury, the law did not confine them to the actual injury, but authorized them to give exemplary damages. It is not alone for willful trespasses that exemplary damages are authorized by law to be given, but they are authorized also for acts of wanton and reckless carelessness.

The instructions, A and B, were, under the facts of this case, properly refused. When the first injury happened in March, a knee or fender of the wharfboat was broken, and this is the only injury which appears then to have been done, and there is no evidence that this knee or fender was not of sufficient strength for the purpose intended, or that this injury occurred through any defectiveness of the boat.—When the last and principal injury was committed, the defendant was not attempting to avail himself of the wharfboat for the purpose for which she was designated, and he has therefore no right to complain that she was not adapted to the purpose for which she was intended, or was not sufficiently protected against danger, or was unseaworthy. However frail the wharfboat may have been, and however unguarded and unprotected, the defendant had no right to drive his steamer forcibly down upon her through willfulness, carelessness, or want of skill.

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It only remains to consider whether the damages are excessive. We think the damages are high.— But the action is one of tort, in which, as we have said, the jury are not confined to the actual injury, and under all the facts and circumstances of the case we are not prepared to say that the damages are outrageously excessive, or that the jury were influenced in their finding by passion and prejudice. The steamer was over three hundred feet long, and was rather an unwieldy vessel, and though we know but little of such matters, it seems to us that such a boat was landed in dangerous proximity to the wharf boat, so near as that great skill and care were requisite in order to avoid collision with the wharf boat in backing out into the stream. Upon the whole case we do not feel authorized to disturb the verdict.

Wherefore the judgment is affirmed.

A petition for re-hearing was filed, but overruled by the court.

Graham vs. The Commonwealth.

APPEAL FROM M'CRACKEN CIRCUIT.

Case 31.

PET. Eq.

In criminal cases the presumption is that the accused is innocent until he is proved guilty, but if insanity be relied on as an excuse for a felony, it is necessary, to authorize an acquittal, that the jury be satisfied that the accused was insane; the law presuming all men to be sane until the contrary is shown. (*Law Lib*, vol. 4, 42; 8 *Scott N. R.*, 595; *Wharton's Crim. Law*, 91; 7 *Metcalf*, 500; 1 *Zabriskie's New Jersey Reports*.)

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The facts of the case are stated in the opinion of the court.—*Rep.*

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O. Turner and L. S. Trimble for appellant—

Argued that the circuit court had erred in refusing to give an instruction to the jury to the effect that if it doubted, upon the evidence, whether the appellant was or not insane at the time of the commission of the homicide alledged in the indictment, that the prisoner was entitled to the benefit of that doubt, and they should acquit him.

That though the proof of insanity devolved upon the accused, yet when proof conducing to show insanity was offered, and the fact of insanity rendered doubtful, that the prisoner was entitled to the benefit of that doubt—and an acquittal follow. That in refusing thus to expound the law, the court had erred, and the judgment should be reversed and a new trial granted.

To authorize a jury to convict of murder, it is necessary that it should believe that the act of homicide was committed with malice. Malice being an essential ingredient in the crime of murder, of the existence of malice the jury should be satisfied beyond a reasonable doubt. The jury was told by the court, that if it entertained a rational doubt of the guilt of the prisoner of the crime charged, that he should be acquitted. And it was also told that the insanity alledged and relied upon, must be proved to its entire satisfaction. These instructions are supposed to be inconsistent, and calculated to prejudice the case of the accused.

James Harlan, Attorney General, for Commonwealth—

Graham was found guilty of murder by the verdict of a jury, and the circuit court having overruled a motion for a new trial, and sentenced the prisoner to be hung, he has appealed to this court.

The questions presented for the decision of the court are—

First. Whether the indictment is good?

Second. Whether the court erred in refusing to in-

struct the jury as prayed for by the counsel for the prisoner?

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Third. Whether the court erred in the instructions it did give to the jury?

1. The indictment contains all the necessary averments to constitute the crime of murder by the common law. It charges that the offence was committed in the county of McCracken, the 23d of August, 1855—that it was done feloniously and with malice aforethought, by stabbing with a knife or some other edged weapon. It contains every fact required by the Criminal Code, section 122, and in the form prepared by the commissioners by direction of the legislature, page 399.

2. The instruction moved by the counsel for the prisoner, and refused by the court, is to the effect that if they believed from the evidence there was a rational doubt, growing out of the evidence, as to whether the prisoner was insane at the time he committed the homicide, then they must give the prisoner the benefit of that doubt, and acquit him.

The court did not err in refusing to give this instruction. It is a settled principle in the criminal law, that if, upon the *whole case*, the jury entertain a reasonable doubt of the guilt of the prisoner, they should acquit him. In this case the fact of killing was clearly proved, and there did not appear to be any excuse or palliation for the act. It then devolved upon the prisoner to show some cause in extenuation. His defence was insanity, and he introduced some evidence conducing to prove it. He failed to sustain his defence in the opinion of the jury and the judge who presided at the trial. In the trial of Abner Rogers before the supreme court of Massachusetts, it was holden by that court "*that insanity, being in the nature of confession and avoidance, must be shown beyond reasonable doubt to entitle the jury to acquit on that account.*" *Commonwealth vs. Rogers*, 7 Metcalfe, 500, and referred to in *Wharton's Criminal Law*, 3d edition, 329; also, 17 *Boston Law Reporter*, 567, where

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the case is reviewed and references given to all of the leading English and American decisions upon the subject of insanity as a defense in a prosecution for homicide.

Chief Justice Hornblower, in *Spencer's case*, says, "It has been repeatedly decided that the evidence of the prisoner's *insanity* at the time of the act ought to be clear and satisfactory. If the evidence leaves it only a doubtful question, the presumption of the law turns the scale in favor of the *sanity* of the prisoner. In such case the law holds the prisoner responsible for his actions." The same learned judge says: "The proof of insanity at the time of committing the act, ought to be as *clear* and *satisfactory*, in order to acquit him, on the ground of insanity, as the proof of committing the act ought to be to find a *sane man* guilty." (*State vs. Spencer*, 1 *Zabriskie's (New Jersey) Reports*, quoted in *Wharton's Criminal Law*, 330.)

In the case of *Rogers*, it was decided by the court that a party indicted for murder is not entitled to an acquittal on the ground of insanity, if at the time of the alledged offense he had capacity and reason sufficient to enable him to distinguish between right and wrong, and understood the nature, character and consequences of his act, and had mental powers sufficient to apply that knowledge to his own case.—Applying the evidence given on the trial of *Graham*, it will be seen that the defense of insanity was not sustained.

3. With respect to the instructions given by the court, I think no serious objection can be urged against them. They are not liable to the charge of being abstract. They present the law as it will be found in any work on criminal law, and are as favorable to the prisoner as the law would permit. The jury were instructed that if they entertained a rational doubt of the guilt or innocence of the prisoner, they ought to acquit him. It is probably true the prisoner was jealous of his young wife, but there was nothing in his demeanor the evening the horrid

act was committed, that indicated any aberration of mind. In a conversation with the coroner the day succeeding the homicide, Graham said "he had before told her if she did not quit having men running after her he would kill her." He carried his threat into execution, and I think he ought to suffer the extreme penalty of the law.

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Judge STILES delivered the opinion of the Court.

January 29.

At the November term, 1855, of the McCracken circuit court, John Graham was tried and convicted of the murder of his wife.

The defense relied on by the prisoner was insanity at the time of the commission of the act, and some evidence was introduced in support of that defense. After the evidence was closed, the prisoner's counsel moved the following instruction: "That if the jury believed from the evidence that there was a rational doubt growing out of the evidence, as to whether Graham was insane, or *non compos mentis*, at the time he committed the homicide, then they should give the prisoner the benefit of that doubt, and acquit him."

This instruction was refused, and an exception taken by the prisoner's counsel, who then moved the court to instruct the jury upon the whole law of the case; and thereupon the court gave the following instructions:

"1st. The court instruct the jury that if they believe from the evidence that Graham killed the deceased, they must find him guilty of murder, unless they believe from the evidence that at the time he did the act he was laboring under insanity of mind.

"2d. That if they believe from the evidence Graham did kill his wife, and that he was laboring under insanity on the subject of love and jealousy, yet if they believe from the evidence he had sufficient reason to know that he was doing wrong and would be liable to punishment, and that he had sufficient power to control his actions and refrain from killing

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her, the law is against him, and they must find him guilty.

"3d. The court instruct the jury that the law presumes every man to be sane until the contrary is shown by the evidence; and before the prisoner can be excused for killing the deceased on the plea of insanity, the jury must be satisfied from the evidence that the accused was laboring under such a defect of reason as not to know the nature and quality of murder; or if he did know it, that he did not know to commit murder was wrong.

"4th. That the true test of responsibility is whether the accused had sufficient reason to know *right* from *wrong*, and whether or not he had a *sufficient power of control to govern his actions*. That if they should believe from the evidence he was a *monomaniac*, yet if they should believe from the evidence he knew it was wrong to kill, and had sufficient power of control to govern his actions, and to refrain from committing the homicide, then the law is against him, and they must find him guilty.

"5th. That if they have a rational doubt as to whether said case is murder or manslaughter, they must find him guilty of the latter as the lesser offense; *and if they have such rational doubt as to his guilt or innocence, they must acquit him.*

"6th. That a rational doubt is one growing out of the evidence, and not a mere chimera existing in the juror's mind; and to acquit on mere light and trivial doubts existing in the juror's mind, and not growing out of the evidence, tends to the encouragement of malefactors, is detrimental to the best interests of society, and a virtual violation of the juror's oath."

And after the instructions were read over to the jury, the court inquired if there was any other point upon which an instruction was desired, and none was requested; but an exception was taken to each of the foregoing.

The jury having found the prisoner guilty, and the

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circuit court having refused a new trial, he has brought the case up by appeal.

The only question for consideration presented by the record, is the propriety of the refusal of the instruction asked for by the prisoner, and granting of others in lieu thereof.

It is earnestly contended in behalf of the appellant, and that is the main ground relied on for reversal, that the humane principle adopted in favor of life, which forbids a conviction whilst there is a rational doubt of guilt, has been violated in this case, by withholding from the jury the instruction asked for, and telling them, in the third instruction granted, that before they could acquit upon the ground of insanity, they must be *satisfied* that the accused was insane when he committed the homicide.

The importance of the case to the appellant has induced a thorough examination of the authorities, within our reach, bearing upon the question, and after full consideration, we feel convinced, from the unbroken current of adjudications upon the subject, as well as from the reason of the rule, that it has not been impinged upon, and that no error was committed by the circuit court, of which the appellant can justly complain.

The rule in question is founded upon the benign presumption of law in favor of innocence until the contrary is satisfactorily established, a presumption which continues in force in behalf of the accused, and remains his shield and protection, as long as a rational doubt exists as to his guilt. To the benefit of this presumption he is always entitled, and it has been extended to the prisoner in this case, for the jury are told in the 5th instruction, that "if they have such rational doubt as to his guilt or innocence, they must acquit him."

This presumption of the law in favor of innocence, is alike essential to the safety of the individual citizen and the security of society, and is universally recognized in all criminal and penal cases.—

In criminal cases the presumption is, that the accused is innocent until he is proved

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guilty; but if insanity be relied on as an excuse for a felony, it is necessary, to authorize an acquittal, that the jury be satisfied that the accused was insane—the law presuming all men to be sane until the contrary is shown. (*Law Lib.*, vol. 4, 42; 8 *Scott's N. R.*, 595; *Wharton's Crim. Law*, 91; 7 *Metcalf*, 500; 1 *Zabriskie's New Jersey Reports*.)

But there are other legal presumptions alike important, and indispensable to the well-being and safety of society, and as necessary in their application in criminal cases. Among these is the presumption of sanity. Every man is presumed to be sane, and accountable, as such, for the commission of crime.— This presumption is as necessary and universal in its application in criminal cases as the presumption of innocence. The same amount of proof is required to rebut the one as the other. And when, as here, a party has committed a homicide, and endeavors to shield himself from the consequences of his act, by a plea of insanity, the law demands of him such evidence in support of that defense as will *satisfy* the jury that when he committed the act he was insane, and, as an insane being, not responsible for his acts.

This rule is founded in wise policy, and is obviously necessary for the protection of society, as much so as that which requires satisfactory evidence to rebut the presumption of innocence. Besides the character of the presumption, its necessary operation in almost every transaction of life, and its almost universal application in civil as well as criminal cases, there are other cogent reasons for this requisition of clear and satisfactory evidence in support of a defense in criminal cases grounded alone upon insanity. In ordinary defenses, such as self-defense, want of malice, sudden heat and passion, &c., when by reason of the killing the burthen of proof rests upon the accused to rebut the legal presumption of malice, the facts relied on are usually a part of the transaction, or so directly connected with it, and so simple and few, that they are readily comprehended and appreciated by a jury, and no jury will convict in such cases, whilst a rational doubt is entertained as to the reality and merit of the defense relied on, notwithstanding the burthen of proof may be, by legal presumptions, cast upon the accused.

But the plea of insanity is peculiarly liable to abuse. It can be so easily concocted, and facts, ad-

missible as evidence in its support, so readily manufactured by the accused. The latitude of inquiry in such cases is almost boundless. It does not, as other defenses, depend upon the proof of facts comprehensible to ordinary minds, and connected remotely or immediately with the transaction under investigation, but in its support facts having no connexion with the transaction, only so far as they may tend to show general or previous insanity of the accused, but happening long anterior to the commission of the offense for which he was tried, and the opinions of learned and scientific men upon such facts, are admissible as evidence. It not unfrequently occurs that ~~this~~ plea is resorted to as a last extremity, with a view of introducing under the latitudinous range of inquiry, a multitude of facts and opinions not directly relevant, but strictly admissible, to produce confusion and doubt in the minds of jurors, and interpose, thereby, obstacles to the attainment of just verdicts. The only safe rule in such cases is to require in support of such defense *satisfactory* evidence that at the time of the commission of the act the party accused was insane. Less than that ought not to suffice, nor with less is the law content.

This principle has been recognized in England and America, in most of the leading cases, since the time of Sir Matthew Hale.

On the trial of Billingham for the murder of Mr. Percival, where the defense relied on was insanity, Lord Mansfield said: "The law in such cases is extremely clear. If a man is deprived of all power of reasoning, so as not to distinguish whether it was right or wrong to commit the most wicked or the most innocent transaction, he could not certainly commit an act against the law. Such a man, so destitute of all power of reasoning, could have no intention at all. In order, however, to support this defense, it ought to be proved by the most distinct and unquestionable evidence that the criminal was incapable of judging between right and wrong."—

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(*Winslow on Plea of Insanity, Law Library, vol. 42, p. 4.*)

The rule seems to have been approved by all the English judges as late as 1843.

The acquittal of McNoughton for the murder of Mr. Drummond, on the ground of insanity, gave rise to an animated discussion in the House of Lords, who ordered various interrogatories to be put to the judges as to the law arising on the plea of insanity in criminal cases, and, among others, the following: "In what terms ought the question to be submitted to the jury as to the prisoner's state of mind at the time the act was committed?" To this they reply: "We have to submit our opinion to be, that in all cases the jury ought to be told, that every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his acts, until the contrary be proved to their satisfaction; and that, to establish a defense upon the ground of insanity, it must be clearly proved that, at the time of committing the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or if he did know, he did not know that he was doing wrong." (8th Scott, N. R., 595; Wharton's Crim. Law, 91.)

In Massachusetts, on the trial of Rogers for murder, the plea of insanity was set up. It was held by the supreme court, that insanity being in the nature of confession and avoidance, must be satisfactorily shown to entitle the jury to acquit on that ground. (*Com'th vs. Rogers, 7 Metcalfe, 500.*)

In New Jersey, it was holden by the supreme court in Spencer's case, "that the evidence of the prisoner's insanity at the time of the act, ought to be clear and satisfactory." And the chief justice, in delivering the opinion of the court, said: "The proof of insanity at the time of committing the act, ought to be as clear and satisfactory, in order to acquit him on the ground of insanity, as the proof of commit-

ting the act ought to be, to find a sane man guilty.”
(1 *Zabriskie's New Jersey Reports*.)

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This principle of requiring clear and satisfactory evidence in support of the defense of insanity, thus appears to be recognized and adopted in England and this country, and not to have been regarded as conflicting with the principle which deems every man innocent until the contrary is shown beyond a rational doubt. It is based upon the legal and obviously necessary presumption of sanity; and, in our opinion, it is a safe rule, founded in reason and good policy, sanctioned by experience and authority, and should not be departed from.

We are of opinion, therefore, that the circuit court did not err to appellant's prejudice in refusing the instruction asked, and in granting the third instruction. Without noticing in detail the other instructions, we deem it sufficient to say that they are as favorable to appellant as the law of the case permitted, and that no error was committed to his prejudice in granting them.

With the facts of the case we have nothing to do. The jurisdiction of this court is limited in such cases to questions of law arising and saved by exceptions during the progress of the case. Beyond that it does not reach.

There being, then, in our opinion, no error in the record, to the appellant's prejudice, the judgment of the circuit court cannot be disturbed, but must stand.

Wherefore, the judgment is affirmed.

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vs.
Commonwealth.

Case 32.

Dryden vs. Commonwealth.

ORD. PET.

APPEAL FROM LOUISVILLE CITY COURT.

1. Congress has "power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." (Art. 1, sec. 8.) The appointment of pilots is a regulation of commerce, (12 *Howard's Rep.*, 316,) but the states may legislate upon the subject where congress has not done so.
2. The act of congress of the 30th August, 1852, for appointing inspectors in certain districts, and authorizing them to license engineers and pilots, supercedes any state law upon the subject, and a license from such inspectors is a protection to the holder against any penalty denounced by a state law for neglecting to obtain a license under its authority. And a license to pilot boats on the Ohio river, between two points embracing the falls of Ohio, authorizes the holder to pilot boats over the falls.
3. A license, under the act of congress of 2d March, 1837, from the governor of Indiana, to pilot boats over the falls of Ohio, was a valid license.

The facts of the case are stated in the opinion of the court. *Rep.*

G. W. Craddock for appellant—

The appellant had two valid defences to this proceeding.

1. He exhibited a commission from J. A. Wright, late governor of Indiana, a state bordering on the Ohio, appointing him a pilot at the falls of the river Ohio, for the term of one year from the 28th April, 1853, which is valid under the act of congress of 2d March, 1837. By that act it is made "lawful for the master of any vessel coming in or going out of any port situated upon waters which are the boundary between two states, to employ any pilot duly licensed or authorized by the laws of either of the states bordering on the said waters, to pilot said vessel to or from said port, any law, custom or usage to the contrary notwithstanding." This was a valid authority to Dryden to pilot boats over the falls of Ohio.

2. The act of congress of the 30th of August, 1852, authorized the appointment of inspectors to license pilots and engineers in certain districts. Louisville is in one of these districts. The defendant had a license from these inspectors to pilot boats on the Ohio between Cincinnati and New Albany, embracing the falls of the Ohio. This was also a valid authority to the appellant to pilot the steamboat Buckeye over the falls.

The power of the state to provide rules and regulations of commerce on her own borders until congress legislate upon the subject, is not questioned; but when congress does legislate upon the subject, the power of the state ceases, as the constitution of the United States, (*art. 1, sec. 8.*) gives the "power to congress to regulate commerce with foreign nations, and between the states, and with the Indian tribes." (*Cooley vs. The Board of Wardens of the Port of Philadelphia*, 12 Howard, 229.)

Dryden had valid authority to pilot boats through the falls, and the judgment should be reversed.

J. Harlan, Attorney General, for Commonwealth—

This case was continued at the last term for the purpose of hearing an oral argument from Mr. Craddock.

The proceeding is in the name of the Commonwealth, but in fact for the benefit of the city of Louisville. I have not felt it my duty to investigate the relative powers of the state of Indiana and the state of Kentucky to commission pilots to take charge of boats passing over the falls of Ohio river. This investigation would also embrace the question, what effect a commission from officers appointed under the act of congress regulating the navigation of the Ohio, and other large rivers upon which steamboats ply, will have in the consideration of this case.

Not having seen a brief on the part of the plaintiff in error, and not knowing the grounds upon which his counsel will rely for a reversal of the judgment, I

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decline at present entering into a discussion of any question which the record may present, except to remark—

1. That the judgment of the court below will be presumed to be right until the contrary is shown.

2. That the line of Kentucky extends to low water mark on the north side of the Ohio river—and the state of Indiana possesses no power to commission officers whose official duties will necessarily have to be executed outside of her territorial limits.

January 30.

Judge SIMPSON delivered the opinion of the Court.

A judgment was rendered against the appellant, in the city court of Louisville, for twenty-five dollars, as a fine for piloting the steamboat "Buckeye" over the falls of the Ohio river, without having been first elected and qualified by the general council of the city of Louisville, as a falls pilot; and he has appealed from that judgment.

It appeared on the trial that the appellant resided in Jeffersonville, Indiana, and was there employed to navigate the steamboat Buckeye, as pilot, over the falls of the Ohio river; that he took charge of said steamboat at the wharf of Louisville, above the falls, and in the character of pilot, not being either the master or owner of the boat, navigated and steered her over the falls in the Ohio river, and rounded to at Portland wharf, which is within the city limits below the falls. As his authority for acting as pilot, he read in evidence a certificate from the inspectors who had been appointed under an act of congress, approved August 30th, 1852, for the district of Louisville, to the effect that they had examined him touching his qualifications as a pilot of steamboats, and having found him to be a suitable and safe person to be entrusted with the powers and duties of a pilot of steamboats, had licensed him to act as such, for one year, on the Ohio river, from Cincinnati to New Albany, Indiana. He also read in evidence a certificate of one of the inspectors, that he had taken an

oath before him, that he would faithfully discharge the duties of his office as required of him by the aforesaid act of congress.

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The act chartering the city of Louisville, approved March 24th, 1851, contains a provision, "that any person piloting boats or rafts over the falls of Ohio, who is not elected and qualified as a falls pilot under this charter, shall be fined for so doing a sum of not less than twenty dollars, nor more than fifty dollars, to be recovered in the city court of Louisville. *But it is provided*, that nothing herein shall be construed so as to prevent masters or owners from taking their own boats or rafts over the said falls without a falls pilot."

The act of congress which was approved August 30th, 1852, provides for the appointment of two inspectors within the respective districts therein enumerated, Louisville being one of them.

It authorizes such inspectors to license and classify all engineers and pilots of steamers carrying passengers.

It provides that when any person claiming to be a skillful pilot for any such vessel shall offer himself for a license, the inspectors shall make diligent inquiry as to his character and merits, and if satisfied that he possesses the requisite skill, and is trustworthy and faithful, they shall give him a certificate to that effect, licensing him, for one year, to be a pilot of any such vessels within the limits prescribed in the certificate.

It declares it to be unlawful for any person to serve as pilot on any such vessel, who is not licensed by the inspectors, and that any one so offending shall forfeit one hundred dollars for each offence.

It was during the existence of the license which the appellant had obtained from the inspectors, that he acted as pilot in navigating the steamer Buckeye over the falls; and the question to be decided is, was it his duty, in addition thereto, to have been elected and qualified as a falls pilot, by the general council

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1. Congress has "power to regulate commerce with foreign nations, & among the several states and with the Indian tribes." (Art. 1, sec. 8.) The appointment of pilots is a regulation of commerce, (12 *Howard's Rep.* 316,) but the states may legislate upon the subject where Congress has not done so.

of the city of Louisville, before he was legally authorized to act in that capacity?

By the constitution of the United States, in the third clause of the eighth section of the first article, it is provided that "the congress shall have power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

The settled doctrine seems to be, that the power to regulate commerce includes the regulation of navigation. As pilots are essential to the safety of navigation, it would seem to result as a necessary consequence, that their appointment, the regulation of their qualifications, responsibilities and powers, would be in effect regulations of navigation, and consequently of commerce, within the meaning of this clause of the constitution.

It was decided by the supreme court of the United States, in the case of *Cooley vs. The Board of Wardens of the Port of Philadelphia, &c.*, (12 *How. R.*, 316,) that congress has the power, under the constitution, to regulate the appointment, the powers and the duties of pilots, but that until this power was exercised by congress, the states might legislate upon the subject, the mere grant of such a power to congress not implying a prohibition on the states to exercise the same power; that it was not the existence of such a power, but its exercise by congress, which might be incompatible with the exercise of the same power by the states.

This decision being on a question arising under the constitution of the United States, must, according to the decisions of this court, be deemed authoritative, and, as such, it settles the doctrine that the states can only pass laws for the regulations of pilots and pilotage, in the absence of congressional legislation on the subject, which may be incompatible with such state regulations.

If, when the act chartering the city of Louisville was passed, congress had not then enacted any law regulating the mode in which pilots should be li-

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censed or appointed, or prescribing their duties, having since legislated upon the subject, the inquiry arises, are the regulations prescribed in that legislation in relation to the powers of pilots who have been licensed by the inspectors, inconsistent with the right claimed by the city of Louisville to require such pilots also to be elected and qualified by the general council?

As the selection and qualification of persons to act as pilots in navigating the falls, seemed to be essentially local, adopted as a measure of precaution and safety for the preservation of vessels and the lives of passengers within the limits of the state, it was supposed, before the subject had been duly considered, that the act of congress might be regarded as referring to a different class of pilots, embracing those only who were employed as regular pilots on steamboats in the ordinary course of navigation, and not applying to those whose duties depended upon the local necessities which made their appointment proper. But to sustain this view, it would be indispensably necessary to limit the power and authority of such pilots as are appointed and licensed under the act of congress, and confine them to one class of objects; when no such restriction is imposed, either by the act itself, or by the terms in which the authority has been conferred under it.

The license to the appellant authorized him to act as pilot on the Ohio river within certain prescribed limits. The authority conferred was general, it was not restricted to any particular class of duties, but empowered him to act as pilot on any part of the river within the limits specified. The act of congress evidently contemplated that such power should be conferred upon him, and authorized it to be done.—He had a right to exercise this power independently of any state regulation upon the subject. This right could not be affected or impaired by any state prohibition. The requisition that he must be elected and qualified by the city council, before he should

2. The act of Congress of the 30th August, 1852, for appointing inspectors in certain districts, and authorizing them to license engineers and pilots, supercedes any state law upon the subject; and a license from such inspectors is a protection to the holder against any penalty denounced by a state law for neglecting

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to obtain a license under its authority. And a license to pilot boats on the Ohio river, between two points, embracing the falls of Ohio, authorizes the holder to pilot over the falls.

3. A license, under the act of Congress of 2d March, 1837, from the Governor of Indiana, to pilot boats over the falls of Ohio was a valid license.

have a right to act as a falls pilot, was a virtual prohibition of the exercise of that power which he derived under the act of congress, and as such was inoperative and void.

But the appellant relied upon another defense which would have been equally valid, if the act of congress of August, 1852, had not been passed. He produced in evidence a commission from the governor of the state of Indiana, in which state he resided, appointing him a pilot at the falls of the Ohio river, and authorizing him to act as such for the term of four years.

By an act of congress, approved the 2d of March, 1837, it was enacted "that it shall and may be lawful for the master or commander of any vessel coming into or going out of any port, situate upon waters which are the boundary between two states, to employ any pilot duly licensed or authorized by the laws of either of the states bounded on the said waters, to pilot said vessel to or from said port, any law, usage or custom to the contrary notwithstanding."

As by this act of congress it was made lawful for the master or commander of the vessel to employ the appellant to act as pilot, his acting in that capacity could not, therefore, have been unlawful, nor could it have subjected him to a penalty under the laws of this state. If then, there be any doubt in reference to the power of a person licensed as a pilot, by the inspectors, under the act of congress of August, 1852, to act as such, independently and in exclusion of all state regulations on the subject, there can be no doubt, that a person residing in the state of Indiana, and regularly commissioned by the governor of that state to act as a pilot at the falls of the Ohio river, has, under the act of 1837, a right to act as such, without any authority from the state of Kentucky. This act was passed by congress for the very purpose of preventing conflicts between the laws of different states with respect to the employment of pilots, and fully embraces the case under consideration.

Wherefore, the judgment is reversed, and cause remanded for a new trial, and further proceedings in conformity with this opinion.

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vs.
WHITE, &c.

Pryor vs. White &c.

Case 33.

APPEAL FROM KENTON CIRCUIT.

PET. EQ.

1. To secure the benefit of the lien law of Covington, in behalf of mechanics, materials, men, &c., the suit must be instituted within one year from the completion of the work, or furnishing the materials.
2. If the party, by contract, postpone the payment for the work or materials, or part thereof, beyond the period of one year, the lien is lost, so far as the payment cannot be demanded within the year.

The facts of the case are fully stated in the opinion of the court.—*Rep.*

Wm. B. Kinkead for appellant—

The only question presented for the decision of this court is—did the circuit court err in deciding that so far as the payments for work, &c., had been postponed, by contract, beyond the period of one year, the lien was waived or lost to appellant.

This question for decision arises under the act of the legislature of 1834, (*Sess. Acts*, 684,) in reference to Newport, and a subsequent act, by which its provisions were extended to Covington. The first section gives the lien without restriction or limitation. The second section gives a remedy to enforce the lien by filing a bill within one year from the completion of the work, &c., and another section provides that taking security defeats the lien.

The suit was brought in this case within the year claiming judgment for all the notes then due, and asserting a lien for such as were not due.

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WHITE, &c.

It is denied that by extending the day of payment beyond the end of one year, that the lien is lost. The object of the law in requiring the bill to be filed within the year, was that others might be apprised of the existence of the lien, and of the intention to assert it, that an innocent purchaser may not be ensnared; and placing it out of the power of the debtor to sell the property and evade the lien.

The legislature gave the lien to secure the laborer in his just rewards, but public policy required that it should be speedily asserted, hence the requisition to sue within one year. In some instances it is required that notices be filed, &c. The commencement of suit is sufficient for that purpose. We ask a reversal.

Bruce Porter for appellees—

The right to enforce the lien claimed by the appellant, is, by the peculiar phraseology of the statute, confined to cases where the right exists to claim and enforce payment within the year from the completion of the work or furnishing the materials.

If the mechanic, by agreement with the owner of the property, places himself in a condition not to demand payment within the year, and thereby place it out of his power to sue within the year, his lien is gone. In this case the appellant, by taking notes at twelve, eighteen, and twenty-four months, executed after the work done, and more than a year after the completion of the work, has lost his right to assert any lien upon the property to that extent.

The statute provides that taking security is a forfeiture of the lien, and shows an intention to waive the lien and rely upon the security taken. (11 B. *Monroe*, 337.) Taking notes in this case, payable beyond the year, shows incontestable evidence of intention not to look to the lien for payment.

There is no ground to suppose that the legislature intended to authorize a suit to save a lien, and thereby make the court of chancery as substitute for the

recorder's office to publish liens. The bill provides that the bill *to enforce the liens* shall be filed within the year, not to be filed to give notice of the claim of lien. No bill can be filed to enforce a lien or collect money not due. The bill which claims that which the chancellor had no right to give was properly dismissed. He could not direct the continuance of a bill, which the plaintiff had shown no right to file. Filing a bill to enforce an immature obligation, is not sanctioned by principle or precedent.

The purpose of the legislature was to give the lien for one year and no longer, and this court cannot, by construction, extend the protection for a longer period.

Judge SIMPSON delivered the opinion of the Court.

February 1.

This action was brought in the Kenton circuit court to enforce a mechanics' lien, for materials furnished and work done in building a dwelling house for the defendant White. For the balance due to the plaintiff on this account, the defendant, after the completion of the work, executed to him four notes, one due in six months, one in twelve months, one in eighteen months, and the other in twenty-four months from the time of their execution, each note being for the same amount.

The act of the legislature, under which the lien is claimed, after giving to certain persons performing labor or furnishing materials, a lien to the extent of the labor done and the materials furnished, provides, that any person having a lien under the act, may *enforce the same* by filing a bill in the circuit court, at any time within one year from the completion of the work or furnishing the materials.

The question that arises in this case is, did the plaintiff by extending the credit beyond the time allowed by the act for the enforcement of the lien, waive the lien with respect to the payments thus postponed, or did the lien still exist, provided he commenced his action within the year?

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vs.
WHITE, &c.

1. To secure the benefit of the lien law of Covington in behalf of mechanics, materials, men, &c., the suit must be instituted within one year from the completion of the work, or furnishing the materials.

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It was obviously the intention of the legislature to limit the duration of the lien, and to require its assertion by suit within the time prescribed. If no suit be brought within the year, the lien given by the statute is lost, there being no other mode allowed for its enforcement. The necessary consequence would seem to be, that if a party places himself in a position which renders him unable to bring a suit to enforce the lien, within the time limited, he thereby virtually waives it, having deprived himself by his own voluntary act, of the right to enforce it.

No action can be brought for the enforcement of a lien, before the debt becomes due, the payment of which it is designed to secure. An action may be previously brought to prevent a destruction or removal of the property to which the lien attaches, that might endanger the sufficiency of the security; but an action for the sole purpose of enforcing a lien cannot be maintained until the debt falls due.

2. If the party, by contract, postpone the payment for the work or materials, or part thereof, beyond the period of one year the lien is lost, so far as the payment cannot be demanded within the year.

The plaintiff brought this action within a year from the time of the completion of the work. But as only one of the notes fell due within the year, the lien could only be enforced to that extent. The bringing of the suit could not save the lien so far as the other notes were concerned, because no action could be maintained upon them until they became due; and also, because the plaintiff had, by agreeing to postpone their payment to a period that rendered the enforcement of the lien with respect to them, impracticable; in effect waived the lien conferred upon him by the act, which he could not receive by claiming the benefit of it, in an action which he could only legally institute or maintain within the year, for the instalment which was payable within that period of time.

Wherefore, the judgment is affirmed.

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Robinson vs. Commonwealth.

Case 34.

APPEAL FROM ADAIR CIRCUIT.

ORD. PET.

1. In an indictment under the first section of the seventeenth article of the Revised Statutes, for shooting at another, (page 264,) it is not necessary to aver that the shooting was done maliciously, and it was not error in the court to refuse an instruction to the jury, that to authorize a conviction, they should believe from the evidence that it was done with malice aforethought.
2. The indictment charged a shooting with the intent to kill and murder. The jury found the defendant guilty of shooting with the intent to kill or wound him; both of the offenses being equally penal offenses, and the charge of intent to kill and murder being the higher offense, includes that of an intent to kill or wound. (*Crim. Code, Sec. 258, and Sec. 259.*) The Code makes all injuries by assaulting, but degrees of the same offense, and to assault with intent to wound is a degree of the offense of assaulting with the intent to kill. The finding of the jury was therefore good and authorized a judgment.
3. The court can only reverse a judgment in a criminal case, for errors apparent on the record. (*Crim. Code, Sec. 348.*)

The facts of the case are stated in the opinion of the court.—*Rep.*

Thos. E. Bramblette, for appellant—

The counsel for the appellant asked the circuit court to modify the instruction asked for by the prosecution, to the effect that unless they believed from the evidence, that the shooting was done with malice aforethought or of premeditation, &c., and if done in the heat of passion in an affray, or under such circumstances as would have amounted to manslaughter only, if death had ensued, they should acquit the prisoner. The court refused so to modify the instruction, and exceptions were taken upon the record. After verdict against the appellant, a motion in arrest of judgment and a new trial was made and overruled, and the appellant has brought the case to this court.

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COMMONWEALTH.

1. Was the instruction erroneous, and should the court have modified it as suggested?

It is insisted that the instruction as given was erroneous, and for the following reasons: 1st. The instruction authorized the jury to find the defendant guilty of an offense not charged in the indictment, and not an offense of lower degree, which would be included in the offense charged. The indictment charges a malicious shooting, with the intent to *kill* and *murder*. It is specific as to the *intent*, and does not charge any intent to *wound*, but to *kill* and *murder*. The allegation of intent is material; without an intent to *kill* or *wound*, no offense within the statute could be committed. And although the intent to kill or wound might both be alleged in an indictment, under our present system, yet when the Commonwealth, in presenting the accusation undertakes to specify the *one intent*, and thus notifies the accused of the nature of the charge, as required by the constitution, it would be a violation of the right secured by that instrument to permit a conviction for another *intention*, though equally penal, yet not alleged. The 258th section does not embrace the case. That section provides, that the accused may be found guilty of any offense included in the charge in the indictment, not higher than that charged. Such is its purport. The offense here presented is not a different degree of the same, but two *intentions*, each having the same penalty attached; the intent to *kill* and the intent to wound, each penal to the same extent, but are each specific offenses under the statute, and not a different degree of the same offense; nor does the one intent include the other. The Commonwealth charged this *intention to kill* as that to be relied on for conviction. The instruction and verdict should conform to the charge in the indictment.

The court erred in leaving it to the jury to decide what was an unlawful shooting. The terms used in the instruction are the same as used in the statute, yet they are too general and indefinite for the con-

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struction of a jury. The jury should have been told more definitely what was an unlawful shooting, either that it was a malicious shooting, or a shooting not in self-defense, and would have been murder if death had ensued.

2. The court should have modified the instruction.

The first clause of the section of law under which this proceeding was instituted, prescribes as punishment for wounding in a sudden heat and passion, or in an affray, and not in self-defense, &c. And in the latter clause of the section prescribing a punishment for shooting at, without inflicting a wound, an entirely different phraseology is used. The first part of the section presents a case, where, if death ensues, the offense would be manslaughter; but the latter part makes shooting with the intent to *kill* or *wound*, without the infliction of any wound, of equal criminality with the wounding of the first character, in the first part of the section. It could not have been the intent of the revisors to make the intent to kill or wound as penal as the actual wounding, done with a similar intent; if so, they would have employed the words—"shoot at without inflicting a wound"—immediately after the words "shoot and wound," in the first part of the section.

By the Revised Statutes, (page 251,) it is made felony and punished by confinement in the penitentiary, to "*willfully and maliciously shoot and wound with the intent to kill.*;" and evidently the intention of the revisors was to make *shooting at, without wounding* highly penal, when intentionally done; or in other words, willfully and maliciously shooting with the intent to kill, under such circumstances as would be murder if death ensued, or felony, if a wounding only had taken place. The *intent* contemplated by the statute is a *murderous intent*. The words used import that there must be *forethought, premeditation*—reasoning in the act. *Intent*, according to Webster, (*see large edition*.) means "a stretching of the mind toward an object—a purpose, a design." It must therefore be equivalent

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to the words "willful and malicious." "Intent" implies a purpose—a design—an effort of the mind—an exercise of the reason—the fixing of a purpose; and therefore an intent to *kill* is synonymous with intent to murder. An act of killing or wounding in sudden heat and passion, is committed *in furor brevis*, not with intention, not with reasoning.

Intentionally and *maliciously* import about the same thing in the commission of crime. Killing may be excusable, or it may be murder or manslaughter. Killing in the heat of passion, upon sufficient provocation, is manslaughter—with malice aforethought it is murder, and intent to kill is equivalent to an intent to murder, and has been so held. (See *Wharton's Crim. Law*, 467,) where this language is used: "An indictment which charges the accused with an assault and battery upon a certain slave, with the intent to commit manslaughter, cannot be construed into an indictment for an assault with intent to kill," which is understood and has been held "an intent to commit murder." Authority cited for the text, *Bradley vs. the State, W. T. & M.*, 618.

The question was whether an intention to commit manslaughter was an intention to kill, in the meaning of the statute. It was held not to be, for the reason that an *intent to kill* is understood to be *an intent to commit murder*. In other words, a man cannot have an intent to commit manslaughter, because an intent to take life implies purpose, design, forethought, reflection, and hence *malicious* and would be murder.

On same page (*Wharton's Am. Crim. Law*, 467.) it is said in a case upon "an indictment for feloniously assaulting and beating *with the intent to disfigure*, stronger circumstances of malice aforethought must be proved, then on an indictment for murder it seems express proof of an intent to disfigure must be made." It is said, however, in *Wright vs. the State*, 9 *Yerger*, 342, that "when the stabbing is proved, the law presumes the existence of malice; to re-

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but which, the proof, either on the part of the State, or of the prisoner, must demonstrate the fact, that the stabbing was under such circumstances as would, had death ensued therefrom, have mitigated the offense from murder to manslaughter or excusable homicide, or left it doubtful whether it was not so done."

The deduction from the authorities, is, that the words intent to kill or wound, in the statute, import a *killing which would be murder*, or a wounding which would be *felonious*, and if such be the correct view of the question, the circuit court erred in refusing to modify the instruction as asked by defendant's counsel, and did not give the whole law of the case to the jury.

The jury, by the instruction as given were limited to the finding of the statutory penalty, and the discretion of the jury is taken away, and it confined to the statutory penalty.

Jas. Harlan, attorney general, for appellee—

Robinson was prosecuted for unlawfully and maliciously shooting at one Lee Coomer with intent to kill and murder him, with a gun and leaden balls and powder, without inflicting a wound.

The jury returned the following verdict: "We of the jury, find the defendant guilty of unlawfully shooting at one Lee Coomer, with intent to kill or wound him; and for his said offense that he make his fine to the Commonwealth of Kentucky, by the payment of one cent, and that he be imprisoned in the county jail for six months."

A motion for a new trial was made and overruled by the court, and judgment rendered in conformity to the verdict, and the defendant has appealed to this court.

The defendant was prosecuted under the following statute:

"If any person unlawfully shoot at another, with intent to kill or wound such person, without inflicting

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a wound, he shall be fined not exceeding five hundred dollars, and imprisoned not less than six nor more than twelve months." (*Rev. Stat.*, 264, *Sec.* 1.)

If there should be any doubt whether the statute above quoted is applicable to the charge in the indictment, section 258 of the Criminal Code applies. It provides that a defendant may be found guilty of any degree of offense not higher than that charged in the indictment, and may be found guilty of any offense included in that charged in the indictment.

The court, at the instance of the commonwealth's attorney, instructed the jury that if they believed from the evidence, beyond the influence of a reasonable doubt, that the defendant unlawfully shot at Lee Coomer, with a gun loaded with powder and ball, with intent to kill and wound said Coomer, without inflicting a wound, they ought to find the defendant guilty, and assess his fine at not more than five hundred dollars, and imprisonment not less than six, nor more than twelve months.

The counsel for defendant asked for a modification to the effect, that unless the shooting was done of malice aforethought, or upon premeditation, &c., and if done in sudden heat and passion in an affray, or under such circumstances as would have amounted to manslaughter, if death had ensued, they should acquit the prisoner.

The court overruled the motion, and this presents the principal, perhaps, the only question for the decision of this court.

The statute under which this indictment was found cannot be found in the old statutes. It was borrowed from the Virginia revision. The word "maliciously" is introduced into the indictment unnecessarily, but it does not vitiate it. It is good without that word. The defendant did, without the authority of law, shoot at Coomer without wounding him. Such is the verdict of the jury. The modification asked by the defendant's counsel did not apply to the case.

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The defendant was not prosecuted for a felony, but for a misdemeanor. I admit that in a prosecution for *maliciously* shooting at and *wounding*; that no judgment could be rendered against the defendant, unless it would have been murder if the party had died. But no such case is presented in this record.

Judge GRENSHAW delivered the opinion of the Court.

February 1.

By the 1st sec. of the 17th art. *Rev. Stat.*, p. 264, it is provided, that, "If any person unlawfully shoot at another, with intent to kill or wound such person, without inflicting a wound, he shall be fined not exceeding five hundred dollars, and imprisoned not less than six, nor more than twelve months."

Under this provision an indictment was found, in the Adair Circuit Court, against James J. Robinson. The indictment charges that the defendant "did unlawfully and maliciously shoot at one Lee Coomer, with intent to kill and murder him, (the said Lee Coomer,) with a gun and leaden balls and powder, without inflicting a wound on him, (the said Lee Coomer.)" The defendant pleaded "not guilty," and the jury sworn in the case, returned the following verdict:

"We of the jury, find the defendant guilty of unlawfully shooting at Lee Coomer, with intent to kill or wound him, and for his said offence, that he make his fine to the commonwealth of Kentucky, by the payment of one cent, and that he be imprisoned in the county jail for six months."

The court, at the instance of the attorney for the commonwealth, instructed the jury, that, if they believed from the testimony, beyond the influence of a reasonable doubt, that the defendant unlawfully shot at Lee Coomer, &c., with intent to kill or wound him, without inflicting a wound, &c., they ought to find the defendant guilty, &c.

The defendant objected to the instruction as given, and moved the court so to modify it as to tell the jury, that, unless the shooting was done with malice

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1. In an indictment under the 1st section of the 17th art. of the Revised Statutes, for shooting at another. page 264, it is not necessary to aver that the shooting was done maliciously, and it was not error for the court to refuse an instruction to the jury, that to authorize a conviction they should believe from the evidence that it was done with malice aforethought.

aforethought, or under such circumstances as would have amounted to murder, (had Coomer been shot and death had ensued,) they ought to acquit the defendant. This modification was refused by the court, and was properly refused, as we think.

By the above quoted clause of the *Revised Statutes*, it is our opinion that the legislative intention is manifested to suppress all unnecessary and unlawful shootings at persons, with intent to kill or wound, whether they might be regarded as done with malice prepense or not. In a sudden quarrel, and in sudden heat and passion, one man may shoot at another with intent to kill or wound him, not in self-defence, and without any legal excuse or justification; and the shooting may be done under such circumstances as to evince malice, and show that if the person shot at had been stricken, and death had ensued, the party shooting might have been held guilty of murder; or, the circumstances may be such as to show that if the person so shot at had been stricken, and death had ensued, the party shooting might have been held guilty of manslaughter only. It was the intention of the legislature, as we think, to punish any person for shooting at another unlawfully, or without any lawful excuse or justification, whether it may be done under circumstances evincive of malice or not. It was unnecessary, therefore, to charge, as is done in this indictment, that the shooting was done maliciously; and, as it was unnecessary to aver malice, it was equally unnecessary to prove it; and hence the court did not err in refusing to modify the instruction as requested by the defendant.

The charge in the indictment is, that the act was done with intent to "kill and murder," whereas, the language of the statute is, "with intent to kill or wound." The indictment would have been sufficient, had it charged simply that the shooting was done with intent to kill; the additional words, "and murder," are supererogatory, and neither vitiates the indictment, nor alters the character of the proof

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necessary to sustain it. Malice is a necessary ingredient to constitute murder; but the word "murder," is not in the statute, and properly, ought not to have been in the indictment. But, a specific offence, in the very language of the statute, had already been charged, to-wit: A shooting at another with intent to kill, and the additional words were mere surplusage.

The jury found the defendant guilty of shooting at Coomer with intent to kill or wound him. The indictment does not charge that the defendant shot at Coomer with intent to wound him, but with intent to kill him only. Both offences are equally punishable by the statute, yet, it is, in truth, a different thing to shoot at another with an intent to kill, and to shoot at him with intent to wound him only. The former offence is more heinous than the latter, though punishable by the statute to the same extent only; and, an assault with intent to wound, may justly and properly be considered an offence in less degree than an assault with intent to kill. And, the *Criminal Code*, sec. 258, provides, that, upon an indictment for an offence consisting of different degrees, the defendant may be found guilty of any degree not higher than that charged in the indictment, and may be found guilty of any offence included in that charged in the indictment. And, *section 259 of the Code*, makes the offences named in each subdivision of that section, degrees of the same offence in the meaning of section 258. The second subdivision includes all injuries to the person by maiming, wounding, beating, and assaulting, whether malicious or from sudden passion, or whether attended or not with intention to kill. Now, in the present case, an offence upon the person is charged, that of shooting at another with intent to kill, which was an assault upon him with that intent; and the offence of shooting at another with intent to wound, is a degree of the same offence. All injuries by assaulting, are, by virtue of said section 259, made degrees of the same

2. The indictment charged a shooting with the intent to kill and *murder*; the jury found the defendant guilty of shooting with the intent to kill or wound him. Both offences being equally penal offenses, and the charge of intent to kill & *murder* being the higher offense, includes that of an intent to kill or wound. (*Crim. Code, sections 258 and 259.*) The Code makes all injuries by assaulting but degrees of the same offense, and an assault with intent to wound is a degree of the offense of assaulting with the intent to kill. The finding of the jury was therefore good, and authorized a judgment.

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offense, and an assault with intent to wound, is, therefore a degree of the offence of assaulting with intent to kill. And, under the indictment, the jury might find the defendant guilty of shooting at Coomer, with intent to wound, although the charge is, that the shooting was done with intent to kill. But the jury found, that it was done with the one intent or the other, and this they might well do, as the punishment is the same, whether the intent was the one or the other.

The instruction is not altogether free from objection, in leaving it to the jury to say whether the shooting was *unlawful*. But, as the facts leave not the slightest doubt that the shooting was done neither in self-defence, nor with any legal excuse or justification, it is impossible that the instruction could have prejudiced the defendant.

3. The court can only reverse a judgment in a criminal case for errors apparent on the record. (*Crim. Code, sec. 348.*)

And, section 348, of the Code, declares that a judgment shall only be reversed for errors of law apparent on the record, to the prejudice of the defendant.

Wherefore, the judgment is affirmed.

Case 35.

Cheshire and Wife vs. Payne, &c.

PER. EQ.

APPEAL FROM UNION CIRCUIT.

1. To render a disposition made by the wife of her property before marriage fraudulent against the husband, as against his marital rights, it must be made pending the treaty of marriage, and without his knowledge.
2. If the husband be apprised, before the marriage, of the disposition by the intended wife of her property, he cannot claim to have been defrauded by it—if, notwithstanding such knowledge, he consummate the marriage contract, he cannot afterwards complain—as such an act on the part of the intended wife would be a valid defense for a refusal to consummate the marriage contract. (*Hobbs vs. Blanford*, 7 *Monroe*, 89, overruled.)

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- 3 The chancellor will not draw nice distinctions in regard to the time at which the information of the conveyance is communicated to the intended husband—it is sufficient if it be before the marriage ceremony take place.
- 4 A parol promise to convey land is not absolutely void. The promisee has the right to have a performance or a rescission at the hands of the chancellor—if the promisor is willing to perform, the promisee cannot have a rescission.

The facts of the case are stated in the opinion of the court.—*Rep.*

James Harlan for appellant—

This suit in equity was commenced in the year 1854, by John S. Cheshire, and Ann, his wife, late Ann Payne, to set aside a deed executed by said Ann to her brother, William Payne, jr., upon the ground of fraud on the marital right of the husband.

The deed is dated October 15th, 1844, and purports to have been acknowledged before the clerk of the county court the day following. Ann Payne and John S. Cheshire were married on the 22d of October, 1844.

This suit was commenced in 1854. The petition alleges that the deed was executed in consideration of representations and promises made by William Payne, sr., the father, and William Payne, jr., the brother, of said Ann, that if she would execute the conveyance, her father would convey to her the farm on which he then resided; that the conveyance was made without the knowledge of the intended husband, but in a subsequent part of the petition the plaintiffs say; "John S. Cheshire was destitute of all knowledge or information of it until after he had arrived at the place fixed for the wedding, and a few moments only before he was called upon to take his place on the floor for the ceremony to be performed." Plaintiffs allege a noncompliance by the father and son of the promises made by them as the inducement for the execution of the deed, and they therefore pray that it be annulled and cancelled, and that

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John Payne, jr., pay rent for the land conveyed thereby.

John Payne, sr., admits he executed a deed of gift to his son John and daughter Ann, in the year 1841, for the land in controversy. He denies he agreed to make a conveyance of the farm on which he resided as an inducement to the execution of the deed of 1844; but admits he said he intended to devise it to his daughter, which promise he intends to fulfill.— He says it is more valuable than the whole of the tract conveyed by the deed of 1841. He says he has given to his daughter and son-in-law, since their marriage, \$700 in money, and three slaves.

The circuit court having granted the relief prayed for, and directed an inquiry as to the value of the rents and profits, William Payne, jr., has appealed to this court.

The judgment is erroneous and ought to be reversed. It is founded upon the idea that the conveyance made by Ann Payne, immediately preceding her marriage with Cheshire, was a fraud on his marital right. I will show from elementary works, and by adjudged cases, both in England and in this country, that the facts of this case did not authorize the judgment that was rendered by the circuit court.

Mr. Bright, in his treatise of the law of "Husband and Wife," *vol. 1, chap. 13, p. 221*, has reviewed all of the English cases, and made copious quotations from Roper on Husband and Wife, and Jacob's Notes, and they establish this principle: That before marriage a wife may dispose of her fortune as she pleases, provided it be done without any *improper motive*, nor to deceive the person who is addressing her.— (*Roper, vol. 1, p. 162.*) In the case of the *Countess of Strathmore vs. Bowes*, referred to in *Wilson vs. Daniel*, 13 B. Monroe, 351, first heard before Judge Buller, (2 Brown's Chan. Rep., 345,) and afterwards, on appeal, before Lord Thurlow, (2 Vesey, jr., 22,) this principle was settled: "That a conveyance by a wife, whatsoever may be the circumstances, and

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even a moment before the marriage, was *prima facie* good, and became bad only upon the *imputation of fraud*. If a woman, during the course of a treaty of marriage with her, made, *without notice* to the intended husband, a conveyance of any part of her property, he should set it aside, though good *prima facie*, because affected with that fraud." (1 *Roper*, 164.)

In the case of *St. George vs. Wake*, 1 *Mylne & Keene*, 610; 7 *Eng. Con. Chan. Rep.*, 188, all of the cases prior to the decision of that case, (which was in 1833,) are referred to, reviewed and commented upon by Lord Brougham, who held, that when a lady, pending a treaty of marriage, which afterwards took effect, made a voluntary assignment of part of her property to her sister, it was held that the husband, who was, under the circumstances, presumed to have had notice of the assignment before the marriage, was not entitled to set it aside on the ground of fraud upon his marital right. "As, however, (said Lord Brougham), everything depends upon the fraud supposed to be practised upon the husband, it is clearly essential to the application of the principle, that the husband should, *up to the moment of the marriage*, have been kept in *ignorance* of the transaction."

In the case at bar, the husband admits he had *notice* of the conveyance *before* the marriage ceremony was performed; and having thought fit to marry the lady, he cannot reasonably complain that he is deceived or defrauded. I have found no case, English or American, except a *dicta* in *Hobbs vs. Blanford*, 7 *Monroe*, 469, where a conveyance of the kind in question has been set aside if the intended husband had notice of it before the consummation of the marriage ceremony.

In *McAfee vs. Ferguson*, 9 *B. Monroe*, 476, the decision in favor of the husband rested upon the ground of the ignorance of the husband, "until after his marriage, that such a deed had been executed."

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In *Wilson vs. Daniel*, 13 *B. Monroe*, 351, the husband was ignorant of the execution of a conveyance by his intended wife, but the court, notwithstanding, upheld the conveyance as not being any fraud upon his marital right.

In a treatise on marriage settlements, by Mr. Ath-erly, page 319, chapter 20, (27 *Law Lib.*, p. 165,) title "of settlements in derogation of the marital rights," the whole subject is discussed very clearly and lucidly, and the conclusions are the same now contended for.

In conclusion, I contend: 1. There was no fraud, in law or in fact, committed on the rights of the intended husband. 2. That the presumption of fraud arising from the execution of the conveyance, pending the treaty of marriage, is repelled by actual notice to the husband before the marriage ceremony was performed. 3. The lapse of time (though not relied upon in the answers,) from the execution of the deed to the institution of the suit—a period of ten years—ought, of itself, to be regarded as sufficient to authorize the court to refuse any relief to the plaintiffs. 4. The judgment of the court sanctioning the right to recover rents, even if the conveyance should be set aside, is erroneous, because the plaintiffs gave no intimation that they looked to or required John Payne, jr., to pay rents. 5. If the plaintiffs are entitled to recover the land, they ought to account for the money and the value of the slaves received from John Payne, sr., subsequent to the date of the conveyance.

J. H. McHenry and Huston on the same side—

Relied upon the following grounds for the reversal of the judgment:

1. The mere negative action on the part of the wife does not amount to fraud; there must be positive acts of dissimulation, or artifice resorted to; the husband must be duped or misled. (*Roberts on Fraudulent Conveyances*, 350-366.)

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2. The English cases are not applicable to this country, because in the former *property* is more looked to, and in the latter the *person* of the woman is the principal motive in contracting the marriage relation.

3. The English cases refer to the potential right of the husband to courtesy; but in this case it is not alleged that the fact exists which would give Cheshire courtesy in the land in the event of his surviving his wife.

4. The cases decided by this court relating to slaves, do not apply to this case, because the rights of the husband to the slaves of his wife vest absolutely. There is a vast difference between the marital rights of the husband to slaves and to land.

5. The cause of action set forth in the petition is denied by the answer, and the truth of the allegations is not sustained by evidence.

6. The long silence of Cheshire is sufficient to authorize the court to presume he acquiesced in the arrangement.

7. The deed of 1844 was made upon a good consideration, and the plaintiffs are estopped to controvert the right of John Payne, jr., to the land. He took no active part in the transaction.

8. John Payne, jr., is not liable for rents during his occupation.

9. If he is, he should be paid for improvements.

Hughes & Dallam, and B. & J. Monroe, for appellees—

Argued: 1. That the conveyance of the land described in the petition by the wife, Mrs. Cheshire, about six days before the marriage, and after it had been agreed on, was a fraud upon the marital rights of the husband, and being made without his knowledge or consent, should be set aside.

The existence of the deed was made known to him a few moments only before the marriage ceremony was performed, and at the place appointed for its performance. Should the communication of the fact

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to the intended husband at such a time, and under such circumstances, place it out of his power to avoid the deed which had been made in fraud of his rights? It is supposed not. As an honorable man he was bound to fulfill his promise, and in doing so he should not be prejudiced in any right which he had, if no such communication had been made. It is said by Bell, in his treatise on the law of property, (*Law Library*, vol. 67, p. 31,) "The more safe, as well as correct doctrine, seems to be that laid down in *Goddard vs. Snow*, 1 *Russ.* 490, by Lord Gifford, M. R., that if at the time of the execution of a settlement, marriage was in the contemplation of the parties, and the woman execute the settlement in that contemplation, and with concealment from the husband, it will not stand against his marital rights." It not only appears from the pleadings, and facts proved, that marriage was in contemplation, but that the connection about to be formed constituted the motive, and especially with the grantee, to have the conveyance made. It is no defence to say that the husband did not know that the intended wife owned the estate when the marriage was contracted. (See *Bell on Property*, *supra*, p. 85, and *side page*; *Ib.*, p. 8; 1 *Russell*, 485.) It is said by the same author, page 30: "But the cases seem equally to establish that where the effect of the wife's disposition is to operate no more than a legal fraud upon the marital right, by curtailing those rights in her property which the law, *de facto*, gives to the husband, without the existence of any legal or moral obligation upon the woman to justify the act done by her, the husband will be entitled to be relieved, although there should be an utter absence of moral fraud on the part of the woman."

2. The conveyance was made alone upon the verbal promise of the father of Mrs. Cheshire, that he would will to her a tract of land, which the father now says he may or may not do, as he shall see proper.

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The delay in commencing suit is sufficiently accounted for in the petition, which is not denied in the answers. It is there stated that the petitioners have been kept back by promises and assurances of an adjustment upon amicable terms, and a conveyance in compliance with the parol promise, until a short time before the commencement of this suit. If it had been the intention of the father to convey according to his verbal promise, it was as easy to do so by deed, reserving a life estate, as by will, to take effect at his death, and thus have ended the controversy.

It is not perceived that any of the cases referred to by appellant's counsel contain any principle at variance with the views here taken. The late decisions of this court have been in accordance with the English authorities, and the case of *Larkin vs. Smith*, 4 *Washington's C. C. Rep.*, 224.

Though there are authorities deciding that if the husband come to a knowledge of a conveyance of property in fraud of his marital rights, he cannot avail himself of objections to it, and that is a justifiable ground for refusing to consummate the marriage, yet it seems to be better calculated to promote the ends of justice, and more proper, that the marriage should be consummated, and the deed set aside, than that the marriage should fail.

The appellees should have the deed set aside, or a conveyance made of the land agreed to be conveyed by the parol promise.

Judge SIMMONS delivered the opinion of the Court.

February 4.

John S. Cheshire and Ann Payne, were married on the 22d of October, 1844. On the 15th day of the same month, Ann Payne, by a deed duly executed and recorded, conveyed to her brother, John Payne, an undivided moiety of about two hundred and sixty acres of land, which they owned jointly, and upon which John Payne then resided. This deed was executed after the agreement to marry had been

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entered into by John S. Cheshire and Ann Payne, and after the day for their marriage had been fixed by the parties.

The tract of land referred to, had been conveyed to John Payne and his sister Ann, in the year 1841, by their father, John Payne, sr. It was at the instance of the latter, that the deed was made by his daughter Ann to her brother. Her father, to induce her to execute the deed, promised her, that she should after his death, have the farm upon which he resided. He states, that knowing there existed unfriendly feelings between the man his daughter Ann intended to marry, and her brother John, and believing that it would be to the advantage of all the parties, that his son should be the exclusive owner of the land upon which he resided, as it could not be divided without greatly injuring the whole tract, and that his daughter should be the exclusive owner of the other tract, he had proposed such an arrangement to his daughter, to which she assented, and the deed was executed to carry it into effect.

This action was brought in 1854, in the names of Cheshire and wife, against John Payne, jr., and John Payne, sr., to annul and vacate the deed executed by Ann to her brother John, before her marriage. The transaction is attempted to be assailed upon two grounds. First, that it was a fraud upon the marital rights of the husband. Second, that a fraud was perpetrated upon the daughter, by inducing her to convey away her land, upon a parol promise, which is not obligatory upon the father.

First. The petition after stating the making of the deed by the plaintiff Ann, to her brother, and the time of, and the circumstances attending its execution, contains the following allegation:—An entire and studied concealment, by father, brother, and sister, of this conveyance, and everything in relation to it, was preserved and kept, and plaintiff, John S., was destitute of all knowledge or information of it, until after he had arrived at the

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place fixed for the wedding, and a few moments only before he was called upon to take his place upon the floor for the ceremony to be performed."

The defendants denied the alleged intention to conceal the execution of the deed, and stated that it had been put upon record the same day that it was made; but they did not alledge they had informed the plaintiff, John, of its execution, or that he had any actual knowledge of it before the time mentioned by him in his petition.

The only circumstances relied upon in this case, to render the deed fraudulent as against the husband, are its execution after the marriage contract was entered into, and the ignorance of the husband that it had been executed, until a few moments before he was married.

To render a disposition made by the wife, of her property before marriage, fraudulent against her husband, as being in derogation of his marital rights and just expectations, it must be made pending a treaty, and in contemplation of marriage, and without the knowledge of her intended husband. Both of these elements must enter into the transaction, to constitute it a fraud against the rights of the husband.

If the husband be apprized before his marriage, of the disposition which his intended wife has made of her property, he cannot, in any just sense of the term, be said to have been deceived by it. If, notwithstanding such knowledge, he deems it proper to consummate the marriage contract, the act is voluntary on his part, and he cannot afterwards complain that the disposition which his wife made of her property, is a fraud upon his marital rights. If the intended wife should secretly, and without the assent of the man she had contracted to marry, dispose of a part of her property, the marriage contract would be thereby avoided, and proof of such a secret disposition of her property would be a valid defence, if an action were brought against the intended husband

1. To render a disposition made by the wife of her property before marriage, fraudulent against the husband, as against his marital rights, it must be made pending the treaty of marriage, and without his knowledge.

2. If the husband be apprized before the marriage of the disposition by the intended wife of her property, he cannot claim to have been defrauded by it. If notwithstanding such knowledge he consummate the marriage contract he cannot afterwards complain, as such an act on the part of the intended wife would be a valid defense for a refusal to con-

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summate the
marriage con-
tract (*Hobbs*
vs. Blandford, 7
Mon., 89, over-
ruled.)

for breach of the promise of marriage. (*Ashtm vs. McDougald*, 5 Beav. 56; *Griggs vs. Staplee*, 13 Jur. 32. See also, *My. & K.*, 619, referred to in 1st vol. *White's Leading Cases in Equity*; *Hare & Wallace's Notes*, p. 348.)

It is true, that it was held by this court in the case of (*Hobbs vs. Blandford*, 7 Mon., 469,) that a conveyance of the wife's estate, between the time of the engagement and the marriage, was a fraud upon the marital rights of the husband, although he had notice of the conveyance before the marriage took place. But that decision cannot be sustained either upon principle or authority.

Ignorance of certain facts, known to the other party, but concealed, or misrepresented, is an essential ingredient to constitute fraud. If all the facts are known, there can be no deception; and if there be no imposition or deception, there cannot be any fraud. In conformity with this view it has been repeatedly decided, and seems to be the settled doctrine of the courts, both in England and in this country, that if the husband has notice, or knowledge of the settlement or alienation, before the marriage, the transaction cannot be impeached. (*Terry adm'r. vs. Hopkins &c.*, 1 Hills Chan., 15; *McClure vs. Miller*, 1 Bailey's Equity, 108; *Fletcher and wife vs. Ashley &c.*, 6 Grattan, 322. *St. George vs. Wake*, 1 My. & Keene, 610; 7 Con. Eng., C. R., 188.)

In the last named case, the chancellor said "it might perhaps be affirmed, that excepting *Goddard vs. Snow*, no case exists of a conveyance by the wife, though without consideration, being set aside simply because made during a treaty of marriage, and without the knowledge of the intended husband. Yet, it is certain that all the cases in which the subject is approached, treat the principle as one of undoubted acceptance in this court; and it must be held to be the rule of the court, to be gathered from an uniform current of *dicta*, though resting upon a very slender foundation of actual decision touching the simple

point. *As, however, everything depends upon the fraud supposed to be practiced upon the husband, it is clearly essential to the application of the principle, that the husband should up to the moment of the marriage have been kept in ignorance of the transaction."*

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But the question still arises in this case, whether the husband should be regarded as having been kept in ignorance of the transaction, or whether the knowledge of it at the time it was imparted to him, should be deemed sufficient to repel the legal imputation of fraud.

As it is essential to constitute the fraud, that the husband should remain ignorant of the transaction until the marriage ceremony takes place, it follows as a necessary consequence, that his knowledge of it at any time previous to that period, will operate to prevent him from impeaching the conveyance on the ground of fraud. In reference to his knowledge, the law fixes but one period, and that is the time of the marriage; it does not draw any nice distinctions with respect to the length of the time before that period, but considers any previous time as sufficient, and leaves the husband to act for himself, according to his own sense of justice and propriety. Until the marriage actually takes place, he is at liberty to retract, and the law justifies him in so doing, if he be notified that his intended wife has, without his assent, made a settlement of her estate that will be prejudicial to his marital rights. But, if with this knowledge, acquired at any time before the marriage actually takes place, he voluntarily complies with his previous engagement, he cannot complain that he was deceived, nor will the transaction be deemed to be a fraud upon his rights as husband.

As, therefore, the husband has admitted that he was informed of the transaction before the marriage ceremony was performed, he cannot assail it on the ground that it was fraudulent as to him, although that information was only imparted to him after he had arrived at the place fixed for the wedding, and

3. The chancellor will not draw nice distinctions in regard to the time at which the information of the conveyance is communicated to the intended husband; it is sufficient if it be before the marriage ceremony take place.

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a few moments only before the marriage did take place.

We are not, however, prepared to decide, that the deed in question would be invalid, even had the husband remained ignorant of its existence until he was married. The doctrine we have been considering, has been usually applied to cases of gifts, and voluntary settlements and alienations; if it has any application where the conveyance has been made for a valuable consideration, it can only be in cases where it is executed for the purpose, and with the effect, of depriving the husband of the interest he would have had in the property of his wife, if the conveyance had not been made. In such a case, there would be actual fraud, against which the husband would be entitled to relief. But here, no such object was contemplated by the parties; the motives by which they were actuated were not culpable; the consideration upon which the deed was executed was adequate; there was no effort to conceal the transaction, the deed having been recorded in the county in which all the parties resided; nor was the arrangement one that if carried into effect, would necessarily prejudice, at least to any material extent, the rights of the husband. It is not, however, necessary in this case to decide this question, inasmuch as the husband was apprized of the execution of the conveyance before he was married.

Second. But is the conveyance valid so far as the wife herself is concerned? She parted with her property in consideration of a verbal promise that she should have another tract of land in lieu thereof, after the death of her father. This promise, although not legally enforceable, is not void; and as her father in his answer, professes a willingness to comply with it, the contract cannot, according to the settled doctrine on the subject, be rescinded on this ground.

As, however, the verbal promise was not obligatory, the plaintiffs had a right to bring this action to

4. A parol promise to convey land is not absolutely void.—The promisee has the right to have a performance or a rescision at the hand of the chancellor; if the promisor is willing to perform, the promisee cannot have a rescision.

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require a fulfillment of it, and if that could not be obtained, then a rescision of the contract. The execution of a will by the father, in which he has devised the land to his daughter, cannot be regarded in law, as a compliance with the spirit and meaning of the contract, because he has the power of revocation, and may exercise it at any time he deems proper, unless he should be rendered unable to do it, by the want of sufficient capacity for its accomplishment. The plaintiffs have a right to have the property secured to the wife, according to the terms of the contract; and to effect this object, the father should be required to convey the land to his daughter, subject to his life estate therein.

The circuit court having rendered a judgment vacating the deed executed by the wife before her marriage, and requiring John Payne, jr., to re-convey the land to his sister, and making him accountable for rents, that judgment being inconsistent with the views expressed in this opinion as to the law of the case, is deemed erroneous.

Wherefore, said judgment is reversed and cause remanded, that a judgment may be rendered in conformity with this opinion.

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Case 36.

APPEAL FROM KENTON CIRCUIT.

PET. Ee.

1. Real property held in the joint names of a firm as partnership stock, is to be regarded at law, as held and owned as tenants in common, in the absence of any agreement or understanding to the contrary, and subject to be so treated. But in equity it should be regarded as held in trust as partnership property, and subject to the rules applicable to partnership personal property, and liable to the claims of the partners upon each other, and the debts of the partnership.

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2. When partners hold real property as partnership stock, and it is liable in equity to the payment of the debts of the firm, the widows are not entitled to dower until the partnership debts are paid.
3. A surviving partner of a firm cannot convey real estate of the firm; the title descends to the heirs of the deceased partner, and they are necessary parties to any suit to pass the title. (*Story on Part. section 94, page 141; Am. Lead. Cases, 492.*)
4. The living wife of a surviving partner has no vested interest in real estate held as partnership stock.
5. It is not every purchase of real estate made by purchasers with the means of the firm, that gives the estate the character of personalty, but only when it is bought for the purposes of the partnership business.

The facts of the case are stated in the opinion of the court. *Rep.*

Kinhead and Stevenson for appellant—

The question presented in this record is one which has been differently decided by different courts.

The circuit judge seems to regard it as a settled question, that real estate held as partnership stock, is to be considered as converted into personalty, as between the heir and administrator of the deceased partner.

At law, real estate belonging to partners, and employed in the business of the partnership, and the title in the joint names of the partners, will be treated and held as a tenancy in common. (*Lawrence vs. Taylor, 5 Hill, 108.*)

In equity, however, it is competent for partners, by express or implied agreement, to give to real estate the character of personalty, and thereby render it in equity liable, as personal property, to creditors, and as between themselves to be so treated.

It is supposed that in this case the heirs of the deceased partner are necessary parties to any suit to pass the title to a purchaser, upon a sale by the chancellor, even to pay the debts of the firm. (*Am. Lead. Cases, vol. 1, 487 to 492.*) where the court will find the subject discussed, and the authorities cited.

The appellant desires to comply with his purchase, if the title can be made good.

Judge CRENSHAW delivered the opinion of the Court.

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February 6.

It appears that F. G. Gedge, J. C. Gedge, C. H. Gedge, and W. H. Gedge were partners, dealing in tobacco and real estate, under the name and style of Gedge & Brothers. F. G. Gedge departed this life on the — day of —, and, at the time of his death, the firm were the owners of the parcel of land in controversy, which was subsequently sold by the survivors to the plaintiff, Galbraith, and bond was executed by them to convey with general warranty. This suit is brought by Galbraith against the surviving partners, and against the widow, children, and heirs at law of the deceased partner, for a specific execution of the contract.

The surviving partners, and the adult heirs and their husbands, answer, admitting the allegations of the petition, and expressing the wish that the plaintiff shall have a conveyance of the land in accordance with the stipulations of the title bond; and the infant heirs answer by guardian *ad litem*. The widow did not answer, or make her appearance.

It was proved that the debts of the firm of Gedge & Brothers were large; that the land in controversy was purchased with the money of the firm, and belonged to the firm; that the firm had but little personal estate, and that it was necessary that the land should be sold for the payment of debts.

Under this state of case, the chancellor decreed a conveyance to be made to the plaintiff by the surviving partners only, expressing the opinion that, as the real property of the partners was necessary for the payment of debts, the survivors had a right to sell and convey. The plaintiff being in doubt whether his title under this decree will be entirely safe and secure, has appealed to this court.

Whether real property, held by partners as partnership stock, is to be regarded as converted into personalty, is a question about which there has been a diversity of opinion. It would be unprofitable, and a waste of time, to attempt to collate and ana-

1. Real property held in the joint names of firm, as partnership stock, is to be regarded at law as held and owned as ten-

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ants in common, in the absence of any agreement or understanding to the contrary, and subject to be so treated. But in equity it should be regarded as held in trust as partnership property, and subject to the rules applicable to partnership personal property, and liable to the claims of the partners upon each other, and the debts of the partnership.

2. Where partners hold real property as partnership stock, & it is liable in equity to the payment of the debts of the firm, the widows are not entitled to dower until the partnership debts are paid.

lyze all the conflicting authorities upon this subject. We are inclined to think, that real property held in the joint names of the firm as partnership stock, should be regarded, at law, in the absence of any agreement or understanding to the contrary, as held and owned by them as tenants in common, subject to the ordinary incidents of tenancies in common. But that, in equity, it should be considered as held by them in trust as partnership property, subject to the ordinary rules applicable to partnership personal property—as liable to the satisfaction of the claim of each partner upon the others, and as liable to the satisfaction of the debts of the partnership. After the satisfaction of the claims of the several partners, and of the debts of the concern, the residue of the real estate will be considered, where the partners have not impressed upon it the character of personality; as belonging to the partners, both in equity and at law, as tenants in common; and it will be subject to division and several appropriation among them.

The land in contest, according to the proof, was held “as belonging to the firm, being purchased by the money of the firm,” but, had not been impressed by them with the character of personality, so far as the record shows. It was held, therefore, as partnership stock, subject, in equity, to the incidents which have been mentioned; but, at law, subject to the rules applicable to a tenancy in common.

If these views be correct, and we think they are, in accordance with the tenor of the authorities, it follows that, upon the death of F. G. Gedge, his interest in the land descended to his heirs at law, who became tenants in common with the surviving partners, and a right of dower, therein, of the widow, attached to this interest; but, the rights of the widow and heirs were subject, in equity, to be entirely defeated by the necessity of appropriating the land to the payment of debts. This necessity existed in this case, and the widow and heirs must surrender all claim to the land.

But, notwithstanding the necessity for the sale of the land to pay the debts of the concern, the surviving partners could not sell the land, and convey a complete legal title without the union of the heirs of F. G. Gedge, in whom the title of his share had vested by descent. It is laid down in *Story on Partnership*, page 141, section 94, that "each partner is required, both at law and in equity, to join in every conveyance of real estate, in order to pass the entirety thereof to the grantee; and if one partner only execute it, whether it be in his own name or that of the firm, the deed will not ordinarily convey any more than his own share or interest therein." And the same doctrine is stated in a note in *American Leading Cases*, page 492. In this case the interest of one of the partners having been vested, by his death, in his heirs, there is the same necessity and propriety for the heirs to unite in a conveyance with the surviving partners, as there would be for their ancestors' doing so, were he alive.

It results that the court erred in directing the surviving partners only, to convey to the plaintiff; and upon a return of the cause, the chancellor will make such orders as will secure to the plaintiff a conveyance to him of the title of the heirs. The interest of the widow, also, should be secured to the plaintiff by appropriate conveyance.

We concur with the chancellor in the opinion that the wives of the surviving partners have no interest in the land, and were not necessary parties, although they united with their husbands in a bond for a conveyance—no interest in them was attached to the land, as it did do in the widow—they have no present interest, and, as the land will be necessarily taken for the payment of the debts of the partnership, they can have none in future.

The views expressed in the foregoing opinion are to be confined, of course, to the facts as they appear in the record. In regard to the character in which the land is held, it only appears that the partners are

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3. The surviving partner of a firm cannot convey real estate of the firm; the title descends to the heirs of the deceased partners, and they are necessary parties to any suit to pass the title. (*Story on Part. sec. 94, p. 141; Am. Leading Cases, 492.*)

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4. The living wife of a surviving partner has no vested interest in real estate held as partnership stock.

5. It is not every purchase of real estate made by partners with the means of the

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firm that gives
the estate the
character of per
sonalty, but on
ly when it is
bought for the
purposes of the
partnership bus-
iness.

"tobacconist merchants, and trading and dealing in real estate," and that the land was purchased with the money of the firm. These facts alone do not, in our opinion, authorize the conclusion that the partners had impressed upon the land the character of personal estate, and that they intended it to be used and disposed of as such. It does not appear that it was purchased to be used for partnership purposes, and to be employed and disposed of as personal property. If real estate be purchased by partners with partnership means, for partnership purposes—that is, be so purchased to be used, dealt with, and disposed of, as personalty, it should, for commercial convenience, partake of the character which the partners have thus impressed upon it, and, upon the dissolution of the partnership by the death of one of the partners, the interest of the deceased partner ought to belong, as personalty, to the executor or administrator, and not descend to the heir, and should be treated in all respects as personal estate. But, as already said, we do not think that the facts in this record are sufficient to authorize the conclusion, that the partners had impressed upon the land in contest the character of personalty. That they were dealers in real estate, conveys the idea that they may have been engaged in speculating in land, and in buying and selling again for profit, but to what extent they had so dealt, or how, or for what purpose the land had been used, the testimony does not disclose. They may have dealt in and purchased lands, not to be employed and used for partnership purposes as personal estate, but to be held and kept for other and different purposes altogether. It is not unfrequently the case, especially of late, in the west, that persons unite their capital in buying and selling real estate, jointly, not for any partnership purpose, though they may be partners in business, and may use their partnership means in their purchases, and have no intention whatever to use the lands or their proceeds for partnership purposes, or to impress them

with the character of personal property. In such cases, although the lands may constitute partnership stock, they should not be regarded as converted into personalty, and the interest of a deceased partner as going to his executor or administrator, but as descending to his heirs, subject in equity, together with the interests of the survivors to the payment of debts, and of the claims of the partners upon one another.

Wherefore, the judgment is reversed, and the cause remanded, for a decree in conformity to the principles of this opinion. But, as none of the defendants resisted an appropriate decree in the court below, and are desirous of securing to the plaintiff a good title, appellant is not entitled to costs in this court.

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PET. EQ.

Neither the act of 1848, that of 1776, 1785, 1796, or 1831, relating to conveyances of land by *femes covert*, authorize the conclusion that a *feme covert*, uniting with her husband in a conveyance of land in which there is a warranty of title, is bound with or as the surety of the husband in such warranty. The statutes only enable her to pass her title.

The facts of the case are fully stated in the opinion of the court.—*Rep.*

J. Harlan for appellants—

Hodge for appellee—

Judge SMITH delivered the opinion of the Court.

February 7.

The important question presented by this record is whether a *feme covert*, who unites in a deed, with her husband, in conveying her own estate, is liable, upon the death of the husband, upon a breach of the covenants of warranty in such deed.

Neither the act of 1846, that of 1776, 1785, 1896, or 1831, relating to conveyances of land by *femes covert*,

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authorizes the conclusion that a *feme covert* uniting with her husband in a conveyance of land in which there is a warranty of title, is bound with, or as the surety of the husband in such warranty. The statutes only enable her to pass her title.

Its determination must depend upon the effect to be given to our several statutes of conveyances prescribing and authorizing married women to convey their real estate, for at common law the deed of a *feme covert* was void, and except by statute there is no power conferred upon them in this state to convey their property.

It was said by this court, *arguendo*, in *Wall vs. Nelson*, 3 *Littell*, 395, that a *feme covert* "might, by uniting with her husband in a deed containing suitable covenants, have imposed upon herself an obligation to warrant the land against adverse claimants." And allusion is made to this *doctrine* in *Deering vs. Shelton*, 10 *B. Monroe*, in terms of approbation; but in neither case was the question now up, directly presented, nor authoritatively settled; so that the point now considered remains yet to be determined by this court; and in arriving at a proper conclusion, it will be necessary to notice the phraseology of the various statutes of this state authorizing conveyances by married women.

The act of 1748 (1 *vol. Stat. Law*, 431,) declares such deeds effectual "to convey and pass over the estate" of the wife.

That of 1776, (3 *vol. Stat. Law*, 140,) that the conveyances made in pursuance of its provisions, "shall be effectual for passing the estate of the *feme covert*."

The language of the act of 1831 (1 *vol. Stat. Law*, 452,) is similar, and only declares that deeds made under it, shall "be effectual to pass all the estate and dower which the grantors or grantor had in the land."

The phraseology of the acts of 1785 and 1796, (1 *vol. Stat. Law*, 434, 440,) is somewhat different, and more comprehensive. Both these acts declare, that deeds made under them, shall not only be sufficient to pass the dower right of the *feme covert*, "but be as effectual for every other purpose as if she were an unmarried woman."

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If unrestricted latitude is given to the words thus used, and they are not to be construed with reference to the subject matter, as well as the preceding and subsequent acts, *supra*, the effect would be to confer upon the *feme covert*, thus conveying, full and plenary power, as a *feme sole*, to bind herself personally, by any direct or collateral covenants inserted in such deeds, relieve her from the disabilities of coverture, and in a measure change the law regulating marital rights, and subject it, in such transactions, to the control of the parties. Such could not have been the intention of the legislature. The object of the acts in question was to facilitate the mode of conveying real estate by married women, not to alter the law of marital rights, nor remove from the *feme covert* the protection which she derives from coverture, and enable her, by such conveyances, to incur responsibilities and obligations to affect her personally after discovery. The language of the preceding acts, and that of 1881 making such deeds only "effectual to pass the estate," shows the intent of the legislature, whilst establishing regulations upon the same subject. And the words, "every other purpose as if she were an unmarried woman," when taken in connection with the words, "shall not only be sufficient to convey and release her any right of dower thereby intended to be conveyed or released," immediately preceding, must be construed as authorizing such *feme covert* to convey every other estate she might have in the land sought to be conveyed, and making a deed executed in pursuance of the provisions of the statutes, effectual therefor, as well as to pass dower estate.

But in *Deering vs. Shelton*, *supra*, we are furnished with a construction of the words referred to. This court there say: "These general words must be construed with reference to the subject matter, and cannot be supposed to have been intended to enable or permit a *feme covert* to do, by means of such a deed, every possible thing which a person *sui juris* might

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do by means of a deed containing a conveyance of land. If the words are to be taken in their utmost latitude, a husband and wife might, through the instrumentality of a deed conveying land, enable the wife to make any agreement which an unmarried woman might be competent to make, and the whole law regulating the marital rights and disabilities of coverture, might be changed or subjected to the will of the parties."

In no case that we have been able to find, has this court given a construction to the acts in question variant from that laid down in *Deering vs. Shelton*, and approved of here; and in none, except *Wall vs. Nelson*, and that of *Deering vs. Shelton*, has it been intimated that a wife would be answerable in damages upon covenants in a deed conveying her own land during coverture.

In almost every instance in which the statutes referred to are spoken of by this court, and deeds executed under their provisions are mentioned, such deeds are treated as simply passing the estate of the wife, and operating only to preclude her from asserting title to the land so conveyed. In *Applegate vs. Gracy*, 9 Dana, 222, a case involving the construction of the statutes now considered, upon another question, this court say: "Upon a careful review of the modern statutes, we are satisfied that their principal intent is to facilitate the *passing* of the estates of *feme coverts*, by deeds acknowledged on privy examination."

In support of the conclusion at which we have arrived, to-wit, that the extent and effect of a deed of a *feme covert* uniting with her husband in conveying her land, under the statutes, should be, and is, to divest her of her estate in such land, we have high authority.

In Rawle on covenants for title, a valuable and interesting treatise upon this subject, it is said—"Questions have arisen as to the liability of a married woman under covenants for title entered into by

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her jointly with her husband, in a conveyance of her estate. The general principle undoubtedly is, that a woman shall not be bound to answer the damages for any contracts made by her during coverture. But there was, it would appear, a distinction observed as to her covenants for title. It having been held in an early case, that if a husband and wife grant land belonging to the wife, by fine, with covenant of warranty, an action would lie against her after the husband's death, in case of the grantor's eviction. This case may be accounted for by the high and solemn nature of a fine, being a proceeding of record in face of a court whose judges were supposed to watch over and guard the rights of the wife. But in this country, where the wife's interest is in general passed by a less solemn form of assurance, and even in England, since a recent statute has abolished fines, and substituted the more simple acknowledgment upon privy examination, which prevails in this country, the opinion seems to prevail that no rule of law exists by which a married woman can be bound to answer in damages, by reason of her covenants for title entered into by her jointly with her husband, although her estate may have passed by a proper acknowledgement." (*Rawle on Covenants*, 573, 574.)

Chancellor Kent says: "The doctrine that a wife can be held bound to answer in damages on her covenants of warranty, entered into during coverture, is not considered by the courts of this country to be law; and it is certainly contrary to the principle of the common law, that the wife was incapable of binding herself by contract." (*Kent's Com. 2nd vol.* 167.)

The same doctrine is affirmed by Chief Justice Parsons, in *Fowler vs. Shearer*, 7 *Mass. Rep.*, 21; and in *Colcord vs. Swan*, same book, 291.

The reasons assigned in the foregoing authorities, apply with full force to cases arising under our statutes. For although the conveying and passing of

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the estate is made as effectual by privy examination and acknowledgment before the proper officer, and authentication by him, as if done by fine and common recovery at common law, it would be going rather too far, to say that such officers or their deputies should be substituted in the stead of courts of justice, to advise, and watch over the rights of married women, and be presumed, upon every privy examination of a *feme covert* conveying her estate, taken before them, to protect her interest and advise her of the nature and obligations of every covenant contained in the deed about to be acknowledged, so as to bind her personally upon such covenants. The manner of taking such acknowledgements in this country, before deputies and other persons not familiar with the character and extent of such covenants, is too loose and informal to authorize the assumption that any such information is imparted to the *feme covert*. And reason and sound policy, as well as a due regard to the interests of married women, forbid such an interpretation of our statutes, as will extend the effect of such conveyances beyond the divestiture of the estate of the *feme covert* who may execute them.

It follows, from the foregoing views, that the deed relied on in this case does not furnish a cause of action against Mrs. Tibbatts, personally. And as the deed itself, nor any allegation in the petition authorizes the conclusion, that she intended to charge her separate estate, if she had any; and as no attempt is made to charge her as distributee or devisee of her husband, we are of opinion that the petition disclosed no cause of action against her, and that the demurrer was, as to her, rightfully sustained.

Wherefore, the judgment is affirmed.

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Bentley &c. vs. Bustard.

Case 38.

APPEAL FROM JEFFERSON CIRCUIT.

ORD. PTV.

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1. Although a fact which might bar a recovery, ought properly to be negatived in a petition on a covenant, and is not negatived, yet if in the answer it be set out and relied upon as a defence, it forms an issue in the case, and no reversal should take place for a failure to make the averment in the petition.
2. To make available as a defence for a carrier of goods by steamboat, for a casting overboard the goods, and their total loss to the shipper, the defence must show that it resulted from the dangers of the river, which could not have been avoided, and that the jettison was "rendered necessary by circumstances, over which the defendants and their agents and servants had no control, and which could not have been avoided by the exercise of that vigilance which was appropriate to their respective stations, and called for by the navigation on which they were engaged, and when there was no reasonable means of avoiding a total loss, but by sacrificing a part of the property at risk, for the safety of the residue."
3. The fact that a steamboat navigating the western waters, is placed in a situation that in all reasonable probability a total loss will ensue, unless a jettison take place of part of the goods, will not justify the jettison and excuse the carrier, unless the crisis come without fault, (i. e.) without due skill and diligence in overcoming the evil; a jettison will not be justified on account of probable injury to the boat, or a desire to expedite the trip, or if it occur from the insufficiency of the boat, or negligence, or incapacity of those engaged in navigating it.
4. By the common law, the common carrier was in effect an insurer against all loss, except loss by the act of God, or the King's public enemies, and jettison was not justifiable unless rendered necessary by one of these causes. Subsequently an exception was introduced into the contract by carriers on sea, of the "dangers or perils of the sea," which denote natural accidents peculiar to that element, which do not happen by the intervention of man, nor are to be prevented by human prudence. (3 Kent's Com., 216, 217.) The peril must appear to have occurred without fault. (*Abbot on Shipping*, 258.)
5. Peril of life is not a necessary ingredient in the justification of a jettison of goods.
6. The same rules, without relaxation, which apply to a justification for a jettison at sea, where the perils of the sea are excepted, apply to a jettison on the Ohio and Mississippi, under the exception of the dangers of the river.
7. If an obstruction in the river be known, and a vessel run upon it, or upon the shore, without being driven by force of wind or cur-

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rent of the river, which could have been prevented by proper care and skill, a jettison will not be justified. By known obstructions is meant, such as were known to navigators of the stream generally, or to the navigators of the particular boat, or discoverable by them by the exercise of reasonable vigilance. (See 4 *Yerres*, 57; 5 *B.* 7, 7 *Id.* 340.)

8. The answer to a petition to recover damages for a loss by the goods being cast overboard by the carrier, to be good, must show all the facts necessary to justification of the jettison. The averment that the loss occurred by the dangers of the river is not sufficient. It is but a conclusion of law.
9. But if a justification be alledged in general terms, which embraces the particular facts necessary to be proved, and the parties go to trial upon that issue, and evidence offered conducing to show facts, upon the finding of which to be true, the jury might have found for the defendants, and a judgment thereon would have been a bar to any future action. Yet, the defendant should not be prevented from questioning the decision of the court, on the ground of errors occurring during the progress of the trial which may have produced a verdict against them.
10. The defendant in a suit for a loss by jettison, should in his defence be allowed the benefit of proving the fact of a consultation with the officers of the vessel, and of their opinions then expressed with respect to the condition of the boat, and probable means of relief, as showing only that the jettison was deliberately made, and in view of the actual circumstances of the case as understood by those best acquainted with them. These facts are not conclusive, however, as to the necessity of the jettison.
11. A pilot is a competent witness to testify in behalf of the managers of a steamboat sued for loss by jettison alledged to be unjustifiable.
12. The owner of a boat sued for jettison, should be credited by loss arising from leakage, on account of defect in the vessels, when received on board.

The facts of the case are stated in the opinion of the Court. *Rep.*

Wm. Atwood for appellant—

Argued: 1. That the circuit court erred in overruling the demurrer to the plaintiffs' petition. The suit is on a bill of lading, which promises conveyance and safe delivery, "the dangers of the river and fire excepted." The petition does not negative loss by dangers of the river, and therefore shows no cause of action. (Cited *Chitty's Plead.* 6 *Lon. Ed.*, 309, 334-5.) If a contract be stated as absolute, it will not be supported by proof of a contract containing an excep-

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tion from certain classes of liability : as for example, "that the carrier was not to be responsible for losses by fire, perils of the sea or the like." (*Greenleaf's Ev.*, 4 ed., 2 vol. 209.) The plaintiff must always state an exception. (*Chitty's Plead.*, ed. 1828, p. 317; *Slocum vs. Fairchild* 14, *Wend.* 329; *Gould's Plead.*, ch. 4, sec. 20.) See the form of a declaration in Covenant in such case. (2 *Chitty*, 366.)

2. The answer of appellant is sufficient. The *Code of Practice*, section 151, says, that the statement of any new matter constituting a defense, shall be in ordinary and concise language, without repetition. This has been done so as to shew an inevitable necessity for a jettison of plaintiffs' goods to save the boat and passengers.

The grounding of the boat was without negligence or want of skill; everything was done that could be done; all this is stated in the answer, and the answer shows the loss to be embraced by the exception. (*Collier vs. Valentine*, 11 *Missouri Rep.*, 299.)

The pleadings are to be liberally construed, with a view to substantial justice between the parties.—(*Code of Practice*, sec. 172.)

It is admitted that to justify a jettison—1st. The boat or vessel must be in imminent danger. 2d. The things selected to be cast out, must be selected for that purpose. 3d. It must be resorted to for the general benefit. 4th. It must be deliberately done. 5th. The vessel must be preserved. (*Stephens & Benicke on Average and Marine Insurance*, 2 ed., 61; *Arnold on Insurance*, 887.) These things are all shown in substance in the answer. The court is referred to *Gould vs. Oliver*, 4 *Bigham's New Cases*, 134; 3 vol. *Eng. Law Rep.*; *Millard vs. Ellis*, 3 *Adolph & Ellis' New Series* 120, 43 *Eng. Law Rep.*

3. The plaintiff had no right to a judgment for the amount which might arise from liability from general average in the suit, and therefore the court did not err in overruling his motion for judgment for the amount on

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general average; no such claim was set up in the plaintiff's petition. The claim was distinct from and inconsistent with that set out in the petition.

4. The circuit judge erred in excluding the testimony offered by defendant to prove that spars and anchors, in the opinion of the witness, could not have been successfully used to relieve the boat. The defendants were bound to use the best means to relieve the boat which they could command. If spars and anchors would have been useless, they were not bound to apply them; this could only be ascertained by the opinion of witnesses. The evidence was admissible, both upon principle and authority. (*Bell vs. Reed*, 4 Binney, 127; *Hart vs. Allen & Grant*, 2 Watts, 114.) The opinions of the officers and crew upon a point involving the propriety of any particular effort, should have been admitted to the jury. (*Reed vs. Dicks*, 8 Watts, 479; *Hart vs. Allen & Grant*, 2 Watts, 114.)

The opinions of the witnesses offered were admissible; they were more conversant with the subject about which they were called to testify. (*Davis vs. Mason*, 1 Pick., 156; *Richard vs. Murdock*, 10 Barn. & Cress, 527; *Malton vs. Nesbit*, 1 Carr & Payne, 70; *Jamison vs. Dunkeld*, 12 Moore, 148; 16 *Shepley*, 317, 11 *Missouri Rep.*, 298.)

The carrier is not bound to make good a loss by a jettison which arises from an intention to benefit the owner, if the loss is one which a man of ordinary firmness and sound judgment would have incurred, and where the loss resulted from the pressure of some real and immediately impending danger, and the necessary resort to avoid great loss. (*Arnold on Ins.*, 884.) It is by the opinions of witness who were experienced navigators alone, that the facts necessary to justify a jettison can be made out. Moreover, the court erred in assuming judicial knowledge without proof, except by one witness, that spars and anchors were the ordinary mode of relieving a boat ground-

ed on a sand-bar, and then rejecting proof that they could not have been successfully applied.

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The carrier is in no case responsible, unless for delinquency, and the delinquency must have contributed to the loss. Whether it did or did not contribute to the loss, is a question of fact for the decision of the jury upon evidence. If it is shown that spars and anchors would have been useless, then there was no negligence in failing to apply them; whether they would or would not have been useless, can only be known by the opinions of witnesses.

5. The court erred in excluding what transpired at the consultation of the officers, as to the course to be adopted in the perilous condition of the boat. (See *Reed vs. Dicks*, 8 *Watts*, 480.) It was part of the *res gestae*. (Story on Bailments, sec. 339; *Tompkins vs. Saltmarsh*, 14 *Searg. & Rawle*, 275; *Beardsley vs. Richardson*, 11 *Wendell* 25; *Duncan vs. Jenkins*, 2 *Adolph & Ellis*, 80; *Angel on Carriers*, 2 ed., sec's. 29, 30, 40, 64, 468; *Milikin vs. Greer*, 5 *Mississippi*, 429; *Poston vs. Postern*, 3 *Watts & S., Penn. Rep.*, 127; *Stitt vs. Wilson*, *Ohio Rep.*, 505; *In re vs. Taylor*, 9 *Paige N. Y. Ch'y. Rep.*, 611.)

The cry from passengers that the boat was sinking, was also admissible as part of the *res gestae*. (1 *Greenleaf*, 5 ed., sec. 8, *Howell's State Trials*, 542,) which the court excluded.

6. The dangers of the river being an exception in the bill of lading, is analogous to the exception in behalf of carriers at sea, of the perils of the sea. The dangers arising from the frequent changes of the bed of the river, and the consequent accumulation of sand bars and snags, is embraced by the exception. The liability does not depend upon the fact alone of whether the bar is well known, so much as upon the fact whether the ordinary channel was pursued by skillful pilots, and whether there was any rashness or negligence in conducting the boat.—Coming in contact with an unknown bar, is one of the dangers of the river. (*Collier vs. Valentine*, *Supra*;

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Eveleigh vs. Sylvester, 2 *Bevard*, 178.) So a loss arising from collision is one of the dangers of the river, and within the exception. (12 *Smeades & Marshall*, 599.) So, of running on an unknown rock in sea navigation. (*Williams vs. Grant*, 1 *Conn. Rep.*) The case of *Friend vs. Wood*, 6 *Grattan*, 189, cited by adverse counsel is not applicable. There was no bill of lading in that case, nor was there a bill of lading in *McCall vs Brock*, cited from 5 *Strobert*, 119. The view of the case, and destination which is relied on by us, is recognized by *Angel on Carriers*, sec'd ed., sec. 168. The dangers of the river are construed to mean such unavoidable casualties as human skill and foresight cannot easily detect. (*Turner vs. Wilson*, 7 *Yerger*, 340; *Gorden vs. Buchanan*, 5 *Ib.*, 171.)

The skill required by the carrier, is the usual skill belonging to such persons, or it is that discretion and foresight which is expected from persons in such employment, (*Williams vs. Branson*, 1 *Murphy*.) or it is the usual diligence and skill, (*Whitesides vs. Thurlkill*, 12 *Smead & Marshall*.) or it is ordinary or reasonable skill and diligence. (*Angel on Carriers*, 167-8, *sup*: *Story on Bailments*, sec. 512.)

It was the province of the jury to determine whether the proper skill and diligence had been employed; and to enable the jury to ascertain these facts, all the circumstances attending to such have been developed.

7. Had the carrier in this case the right to make the jettison? The affirmative is insisted on. A jettison is justifiable to preserve life, but is not justifiable if rashly, imprudently, or unnecessarily made. (*Story on Con.*, 1 ed., sec. 461, citing *Mouse's Cases*, and 2 *Coke's Rep.*, 63; *Smith vs. Wright*, 1 *Caine's Rep.*, 43; 2 *Kent's Com.* sec. 4, p. 604; *Jones on Bailment*, 107-8; *Story on Bailment*, 575; *Bird vs. Astcock*, 2 *Bulstrode's Rep.*, 280; 2 *Rolle's Ab.*, 567; *Bancroft's Case referred to*, cited in *Kenrig vs. Eggleston*, *Alley's Rep.*, 93.)—Chancellor Kent says, "if goods be destroyed by necessity, as by throwing them overboard from a vessel

or barge, for the preservation of the vessel and crew in a tempest, the carrier is not liable. (2 *Kent's Com.* 5 ed., 604, 625; *Story on Bailment*, sec's 527, 531, 575, 583; *Gillet vs. Ellis*, 1 *Peck Ill. Rep.* 579.)

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What is the remedy for the loss incurred by a justifiable jettison? It is a general average contribution, the cargo, freight and vessel contributing to pay the loss. (*Abbot on Shipping*, page 473.) The rule of the Rhodian law, is this: "If goods are thrown overboard in order to lighten a ship, the loss incurred for the sake of all, shall be made good by the contribution of all. The safety of some should not be purchased at the expense of others; therefore, all must contribute to repair the loss." (See *Whittridge vs. Norris*, 2 *Mass. Rep.*, 125; *Nickerson vs. Tyson*, 8 *Ib.*, 467; *Maggrath vs. Church*, 1 *Caine*, 196; *Sampson vs. Ball*, 4 *Dal.*, 459; *Gray vs. Waln*, 2 *Searg. & Raw.*, 229.)

8. It is admitted that the sacrifice should appear to have been made under the urgent pressure of some real and immediate danger, and resorted to as the sole means of escaping a greater loss; (*Arn. on Ins.*, 884,) that it was the result of deliberation, not the result of a groundless timidity. Lord Kenyon says: "The rule of consulting the crew is rather founded on convenience than necessity." (*Bukley vs. Presgrove*, 1 *East*. 228.) Judge Story says: "A consultation with the officers is highly proper in cases which admit of delay and deliberation, but if the propriety and necessity of the act be otherwise made out, there is an end of the substance of the objection." (13 *Peters*, 343-4.)

What degree of danger must exist to authorize a jettison cannot be defined with exactness. It is clear that the moment of the greatest distress cannot be waited for. A measure so long deferred might often prove too late, and if it were put off till without that measure be resorted to, all would be lost, it would be no sacrifice. (*Stevens & Benecke on Average*, 99.) If due judgment and discretion are used in

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making a jettison, it will be a case of average, although the master may be mistaken as to the degree of danger. (*Ib. note, page 61.*) It must be in apparently imminent peril, (*Philips on Ins., 3d Ed., p. 65, sec. 1270.*) "In this respect it is usually considered sufficient, if it appears to the master or other party having charge of the subject matter, to require the sacrifice, and the same is made in good faith." (*Ib. sec. 1271.*)

Abbott says a jettison is justifiable where the vessel is laboring on a shallow. This is the case here, and is one of the dangers of the river. (*Kent's Com., supra; Stephens & Benecke on Average, 102; Ib. 64.*) It should be made of goods of the least value and most weighty, as was the case here.

The custom, as is proved, justified the stowing of the molasses of the appellant on deck. (*Brown vs. Cornwell, 1 Root's Con. R., 60; 4 Campbell, 142; Abbot on Ship., 488; 4 Bingham's New Cases, 134; 33 vol. Eng. Com. Law Rep.; 3 Adolphus & Ellis, New Series, 120; 43 vol. Eng. Com. Law Rep.; Gillet vs. Ellis, 11 Ill. Rep.; 1 Pick., 579; 6. Ohio Rep., 30; Phillips on Ins., 3 Ed., sec. 1274, page 74; Arnauld on Ins., 2 ed., 888; Barber vs. Brace, 3 Conn. Rep., 9.*)

The case, as made out by the proof and admitted, shows: 1. That this was a case of jettison. 2. That it was necessary, and caused by the dangers of the river; or, in other words, produced by accidental grounding. 3. The molasses thrown overboard were the most convenient to be reached, the least valuable, and the heaviest part of the cargo. 4. That the captain consulted the officers. 5. The boat was apparently in imminent peril—nay, more in real immediate danger of loss. 6. The jettison was the only means of saving the boat. 7. The jettison was ordered by the captain. 8. The boat was by the jettison preserved. 9. The cargo was stored on the deck according to general custom. The consequence is, that this is a loss to be met by general average, and not by the owners of the boat. The *admitted*

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evidence establishes all the foregoing propositions ; but if the evidence only conduced to establish these facts, they should all have been permitted to go to the jury, with proper instructions from the court, arising upon the facts. The exclusion of the evidence is complained of. The positive instruction of the court to find for the plaintiff on the question of jettison, is also complained of. Justice demanded the admission of the excluded evidence, and a full and fair trial by the jury. The judgment for \$3,858 48, was therefore erroneous.

The pilot was a competent witness. The carrier is sued for an unjustifiable jettison, not for any act of the pilot, and he is no way responsible, though there may be a recovery.

The defendants were not responsible for the loss in the molasses by leakage. The proof showed that they were shipped in bad order, hence the insertion of the clause, "not responsible for leakage or cooperage." Even without such a clause, there was no responsibility for loss resulting from the bad condition of them when received, (*Story on Bailments, sec. 492.*) unless in case of gross negligence. (*Reno vs. Hogan, 12 B. Monroe, 63.*) The court properly instructed the jury on this point, and the cross errors cannot avail.

A reversal is asked upon the errors of appellant.

W. Morris, on the same side—

1. The plaintiff after setting out the bill of lading with the exceptions that the defendants were not liable for loss by the dangers of the river and fire, alleges that they delivered only part of the barrels and half barrels, and further, that the barrels delivered were not in as good condition as when received, and that plaintiff was compelled to incur expense for cooperage, and that after deducting freight, there was due to plaintiff \$4,129 39, for which he prays judgment.

These statements, by way of breach, may be all

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true, and yet the defendants in no wise guilty of a breach of their contract, as set out in the petition, and shown by the bill of lading made part thereof.

The plaintiff should have averred, by necessary averments in his petition, that the defendants were not prevented by fire or the dangers of the river from delivering the cargo. In 1 *Chit. Plead.*, 11 *Am. Ed.*, 335, it is said that if the breach vary from the sum and substance of the contract, and be either more limited or larger than the contract, it will be insufficient, as in covenant to repair a fence, except on the west side thereof, a breach that the defendant did not repair the fence, without showing that the want of repair was on the other parts of the fence than on the west side. The declaration would be held bad on demurrer, though it would be aided by verdict. It is essential when an exception or a proviso is introduced or referred to in the obligatory clause of an instrument, upon which is sued to negative the exception, restrictive of his liability in setting out the breach, otherwise, the declaration will be bad after verdict. The same author (*Ed. of 1828*, 1 *vol. page 268-9*) says: "But if such proviso or condition constitute a condition precedent, or if there be any other matter which qualifies the contract, or goes in discharge of the liability of the defendant, it must be stated." And he illustrates the principle by various examples, amongst which is given the case of a carrier.

The same author, (2 *vol. page 366.*) in giving the form of a declaration against a carrier by water upon a bill of lading, sets out the undertaking of a carrier to convey the goods from one place to another, and there deliver them to the plaintiff, "the dangers of the seas only excepted," and after charging, by way of breach, the failure to deliver the goods, alleges "that no dangers of the sea did prevent him from so doing, but on the contrary thereof, the defendant being master of the ship, &c., so carelessly behaved and conducted himself, with respect to the

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residue of the goods, that by the mere carelessness and negligence, and improper conduct of said defendant and his mariners and servants, in that behalf, the said residue of the goods of great value, became and were lost to the plaintiff." A second count is added without setting out any bill of lading, but charging the defendant with negligence, &c., in failing to deliver, &c. This position is sustained by *Gould on Pleading, chap. 4, sec. 20.*

Cases may exist in declaring on a contract which contains a defeasance, where it is not necessary to state the defeasance. A defeasance is an instrument which defeats the force and effect of some other instrument, or deed, or estate. (*Gr. Cru., T. 32, chap. 7, sec. 27.*) If the defeasance be incorporated in the same deed or instrument it becomes a condition, upon the performance of which, the estate created, or thing to be performed, is thereby annulled and made void, which in pleading, as a general rule, should be shown by way of defence; but the rule in respect to contracts containing exceptions, such as the one now under consideration is different, for the reason that no liability was ever incurred by reason of the perils thus excluded. Under this view of the case, the court erred in not sustaining the demurrer to the petition.

2. The answer of the defendant's is a full response to the petition, and sets out a valid defence under the exceptions contained in the bill of lading, and the demurrer to it was properly overruled. Taking the statements of the answer as true, a complete justification for the jettison is made out; it was not necessary to detail all the circumstances which established the justification.

3. The court did not err in its decision upon the question made in regard to the leakage from the barrels, on account of defect of cooperage; the exception of liability on that account was made in the bill of lading. (See *Reno vs. Hogan, 12 B. Mon., 63.*)

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The proof showed clearly the bad condition of the barrels when shipped.

4. No good reason is perceived why Jamison, the pilot, should have been excluded as a witness. The cases relied on by appellee's counsel, are not applicable to a case like this; those were cases where the principal was sued for negligence and mismanagement of the agent, in which the latter was held incompetent to testify in behalf of his principal.— These cases will not apply. This suit is not brought against the principal for negligence or mismanagement of the pilot while in charge of the boat, but is an action for failure to deliver the goods, without a charge against any officer of the boat for negligence, or want of skill in the management of the boat, and consequently the pilot can have no interest in the result of the case. (*Larin vs. Carrol Ins. Co.*, 1 *Wil. O. Rep.*, 223.) The pilot was held to be a competent witness in an action by the owners against the underwriters, for the loss of a vessel while in his charge.

5. It is insisted for appellants, that the circuit court erred in rejecting the testimony offered by them, to prove that spars and anchors could not have been used to any purpose, and that it was an error to permit the plaintiff to read parts of his examination without reading the whole. The condition of a boat in distress, and all the surrounding circumstances, is necessary to be considered in deciding upon the most proper expedients to be adopted for her relief; as the sound practical physician varies his prescription according to the type of the disease of his patient, so will the experienced navigator be governed in the use of means to relieve his vessel. If a steamer in ascending the Mississippi or Ohio, while rising, should ground on a smooth level bar, spars and anchors would in general be the appropriate means of relief; but suppose the water to be out of the banks and falling, and the boat run on a log or other obstruction in the water some forty or fifty feet

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deep, and the bow so raised as to cause water to enter at the stern, so fast as to justify the inference that she must sink in one hour, and the boat could be relieved by casting overboard one-thirteenth part of the cargo; but instead of that course, the commander set about rigging spars and anchors, which, if practicable at all, would require some three or four hours, would not such an officer be pronounced wholly unfit for his position? Yet such an one, when taunted for his lack of skill, might plead the judgment of the circuit court in this case, as an apology for his conduct. Whether under all circumstances it would have been judicious to attempt the use of spars and anchors, was a question of fact for the jury and not the court to decide; and the court erred in deciding otherwise.

The court, by overruling the demurrer to the answer of defendants, in which is distinctly stated the impracticability of using spars and anchors for the relief of the boat, as a ground of defence, thereby recognized the competency of such proof in the defence, and that any attempt to do so, would have increased the peril. The court should have admitted the cross examination of witnesses bearing on this point, to have been read to the jury with other parts of the depositions which were read; though it consisted of opinions, it was competent, being the opinions of experienced navigators. (*Walker vs. Protection Ins. Co.*, 29 *Maine Rep.*, 320, and authorities there cited; *Matton vs. Nesbit*, 1 *Carr. & Payne*, 76, found in 11 *Con. Com. Law Rep.*, 318; especially the opinions of Abbott, justice on this point.)

6. It is denied that any case can be found, where the master or carrier has been held liable for the value of goods cast overboard justifiably, for failing to hold possession of the remainder of the cargo, until a general average estimate is made. That was the civil law rule, and the average was to be computed at the port of destination; but it is denied that it has ever been followed in England or America.—

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It would be impracticable to enforce such a rule in the United States. Suppose the case of a steamboat at Pittsburgh, or Louisville, taking on board a cargo, parts of which are live stock, and for ports on the whole line of the Ohio and Mississippi, even to the port of New Orleans, must the vessel convey all to the last named port to make the general average? Or, suppose a steamboat leave New Orleans with goods, groceries, tropical fruits, &c., for towns, villages, and farms, on the Mississippi and Ohio; a jettison is necessary before reaching Natchez; is the vessel then to be run to the place of destination, say Louisville, conveying the remainder of the cargo, in order to make the average estimate? It cannot be so. A fair interpretation of the authorities on this subject will lead to no such absurd conclusion. Stephens in his Treatise on Average, page 51, says it is frequently asked whether the master can refuse to deliver the goods to the merchant until he is satisfied. This is so well answered by Pothier, that I cannot do better than to quote his words: "Goods cannot be retained for freight, and contribution ought not to have a greater privilege than freight; but though the master cannot retain the goods, he may seize them on the quay, until security is given: nevertheless, if the merchant is in good credit, to deliver the goods, and this being the custom, the master is not liable for his insolvency." This, says Stephens, is also the custom with us, but the master may if he choose, insist upon the consignees entering into an average bond; such an instrument is, however, but of little use, unless the names of the arbitrators be inserted, as it will be an obligation to do only what the law would compel them to do.— (*Hallet vs. Bangfield*, 18 Vez., 187; *Abbott on Shipping*, Am. ed. of 1850, 507-8.) See *Phillips on Gen. Av. and Ins.*, 210, where it is clearly laid down, that though the master may retain for general average, he is not bound to do it. Also, *U. S. vs. Wilson*, 3 Sumner, 308. In (*Simmons vs. Loder*, 2 Barn. & Cross, 805, and

Scarf vs. Tober, 3 Barn. & Adolphus, 523, the right of the master to retain is recognized, but no intimation is given of his liability if he fail to do so.

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But the plaintiff in his petition does not claim the benefit of an average adjustment of the loss; that is not the object of his suit, and he cannot insist upon a recovery on that principle; and disclaimed in the circuit court, and now for the first time relied upon in this court.

The exception of the dangers of the river contained in the bill of lading, must be taken as applicable to the dangers resulting from the navigation of the river in the ordinary way, with such reasonable care as a prudent man would use in regard to his own property. In the case of *Collier vs. Valentine*, 11 Mis. Rep., 299, the doctrine is recognized that each case, in respect to diligence or negligence, must be determined very much by its own particular circumstances, growing out of the navigation of our rivers, and the result tested by the course usually pursued by skillful pilots. In *Hart vs. Allen*, 11 Watts, 115, the court said that it was not sufficient for the plaintiff to prove a defect in the vessel, but he must also show that that defect in some way contributed to the loss. See also, *Fairchild vs. Slocum*, 19 Wend., 32.

James Harlan on same side—

1. The first question to which I will call the attention of this court is, whether or not the court erred in instructing the jury?

The testimony of a great number of witnesses, all of whom were men of skill and experience in the navigation of the Mississippi and Ohio rivers, as pilots or captains, concur—1. That the middle channel at Montezuma bar, in the condition of the river when the accident occurred, was the proper channel. 2. That spars and anchors are of no use where the sand is soft. 3. That a boat grounded, as the *Glendy Burke* was proved to be, with a strong current running under her midships, would, unless speedily re-

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lieved, break in two and be lost. 4. That new formations of sand are suddenly made in the Mississippi river which baffle the skill of the most experienced pilots. 5. That the middle channel is safer for ascending boats than the bend channel.

The other pilot, Smith, the mates, and engineers, were examined, all of whom sustain the evidence of Jamison, as to the occurrences of the night, and the absolute necessity of throwing a part of the cargo overboard to save the boat and the remainder of the cargo.

What is the law arising on these facts? Chancellor Kent says: "If goods be destroyed by necessity, as by throwing them overboard from a vessel or barge for the preservation of the vessel and crew in a tempest, the carrier is not liable." (2 *Kent*, 603.) Again: "It is often a difficult point to determine, whether the disaster happened by a peril of the sea, or unavoidable accident, or by the fault, negligence, or want of skill of the master. If a rock, or sand-bar be *generally known*, and the ship be not forced upon it by adverse winds or tempests, the loss is to be imputed to the fault of the master. But if the ship be forced upon such rock or *shallow* by winds or tempests, or *if the bar was occasioned by a recent and sudden collection of sand, in a place where ships could before sail with safety, the loss is to be attributed to a peril of the sea which is the same as the vis major or casus fortuitous of the civil law.*" (3 *Kent*, 217.)

Judge Story says: "The case of a jettison at sea, to save the vessel from foundering, and to preserve the lives of the crew, is (as we shall presently see,) a loss by the act of God, although it is accomplished by the immediate agency of man." (*Story on Bailments*, sec. 525.) "But there are also cases, where the carrier's own agency is concerned in the loss, which, however, is by law deemed excusable. Thus, in cases of throwing goods overboard to lighten a ship or boat, and preserve life, the carrier will be excused, if it has arisen from necessity. Thus, if a

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ferryman should, in a storm, throw overboard even a box of jewels, if it was done from absolute necessity to save life, he would stand excused. But, if it was done without necessity, or rashly and imprudently, it would be otherwise." (*Ibid*, sec. 575.)

It is admitted that the owners of steamboats on the western waters are common carriers, and are liable as such, but their liabilities may be modified or restricted by the terms of the contract of affreightment. The argument on the other side is, that the plaintiffs in this case are liable as common carriers to the same extent as if no bill of lading had been executed, and that nothing will excuse them for a loss in this case, unless it was occasioned by an act of God; that no case of jettison can be found where the act was justified or excused, if the necessity was caused by human agency.

The authorities do not sustain that position. In the case of the *Columbian Insurance Company vs. Ashby, &c.*, 13 *Peters*, 331, the master of a vessel in a storm voluntarily run the vessel ashore, and she was lost, but the cargo was saved. The court said it was a proper case for general average. In the opinion in that case, Judge Story lays down the principles which authorize a jettison. 1. "That the ship and cargo should be placed in a common imminent peril. 2. That there be a voluntary sacrifice of property to avert that peril; and, 3. That by that sacrifice the safety of the other should be presently and successfully attained"—page 338. The court say, "that whatever is sacrificed voluntarily for the common good, is to be recompensed by the common contribution of the property benefitted thereby"—page 343.

In the treatise on contracts by W. W. Story, it is said: "In cases of carriage by sea, the bills of lading often contain an exception of responsibility for losses arising from 'perils of the sea.' This term, which would naturally include only dangers arising immediately from the sea, and peculiar to it, has been construed to include within it, captures by pi-

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rates; losses by collision, where there is no blame; destruction of goods at sea by rats where there is a cat on board; and all injuries and damages resulting to goods from the effect of storms and tempests upon the ship. A common carrier would not, therefore, be responsible for such injuries and losses." (*Story on Contracts, section 754.*)

Again: "A common carrier is not, however, responsible for losses arising from the ordinary wear and tear of transportation, or for deterioration in quantity or quality, arising from any inherent tendency in the goods to decay or damage, as for leakage and firmentation, or rotting without his default, or for injury or damage resulting from the default of the owner or shipper, such as defective packing; so, also, there are cases of great exigency, where the loss is occasioned by the act of the carrier, in which the law, in consideration of the necessity of the case, excuses him. Thus, if he make a *jettison* of goods, to lighten a ship or boat in danger of foundering, or to preserve life, he will not be responsible for the loss." (*Story on Contracts, sec. 753.*)

The same author says: "'Dangers of the river' is also another phrase by which common carriers on water sometimes limit their responsibility; and it has received nearly the same definition from the court as 'perils of the sea.' Some new causes of loss would, however, come under this term, not strictly 'perils of the sea,' such as hidden obstructions in the river, newly placed, and not only not known to be there, but of such a character that human skill or foresight could not have discovered and avoided them." (*Story on Contracts, sec. 754, b.*)

The supreme court of Illinois decided that "the law is well settled, where goods are necessarily thrown overboard in a tempest, to preserve the vessel and crew, that it is a loss of inevitable accident, or, as it is usually termed, the act of God, which excuses the carrier." (*Gillett vs. Ellis, 11 Illinois Rep., 580.*)

In the case of *Collier vs. Valentine*, 11 *Missouri Reports*, 299, the principle for which plaintiffs in error contend, was expressly decided. The steamer Oregon left St. Louis for New Orleans, and about fifty miles below the former city, she ran with her bow against a sand-bar, and by the force of the current immediately swung round. In swinging, the side of the boat, near the stern, or between the after-hatch and the stern post, struck a snag, which tore a hole in her, and then she swung over the snag up against the bar. The boat and much of the cargo, including the plaintiff's bacon, was lost. The place at which the vessel struck was a narrow channel, with a bar on one side and a swift current on the other. The captain, who also acted as pilot, was at the wheel when the accident occurred, and was reputed to be one of the best pilots on the river. The testimony shows that the boat was in the channel, but bearing to the right to avoid the snags, the bow struck the bar, and then the swinging became inevitable, and the loss was the necessary consequence. Upon these facts the judges of the supreme court of Missouri were unanimously of the opinion that the owners of the boat were not liable for the loss of the bacon which plaintiff had shipped on her. The same court decided that the master of a steamboat carrying wheat, which was wet by inevitable accident, is not liable for damages because he did not dry the wheat. (*Steamboat Lynx vs. King*, 12 *Missouri Rep.*, 272.)

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The supreme court of the United states, in the case of *Clarke vs. Barnwell*, 12 *Howard*, 272, decided, that where goods are shipped and the usual bill of lading given, "promising to deliver them in good order, the dangers of the seas excepted," and they are found to be damaged, the *onus probandi* is upon the owners of the vessel, to show that the injury was occasioned by one of the *excepted causes*. But although the injury may have been occasioned by one of the *excepted causes*, yet still the owners of the vessel are

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responsible, if the injury might have been avoided, by the exercise of reasonable skill and attention on the part of the persons employed in the conveyance of the goods. But the *onus probandi* then becomes shifted on the shipper to show the negligence.

This case establishes the principle, that if the loss was occasioned by the perils of the sea, there is no responsibility on the vessel, unless negligence is shown, and that must be done by the shipper or owner of the goods.

Now I submit to the court, whether new formations of sand and hidden snags in the Mississippi river, should not be classed under the head, "dangers of the river"? I think I have shown that such is the doctrine of the present day.

I think the doctrine upon the subject of the responsibility of common carriers by water, may be summed up thus: 1. If the bill of lading contains no exceptions, then nothing excuses the carrier but the act of God or the public enemies. 2. If it contains the exception, "dangers of the river," the carrier is not responsible, if he can show that the loss was in consequence thereof; and to establish which the *onus* is on the carrier. 3. That although the loss was occasioned by the "dangers of the river," yet the plaintiff may show negligence of the carrier, but in such case the burthen of proof is thrown on the plaintiff.

The evidence in the record establishes, beyond question, that the accident which occurred at Montezuma bar, was occasioned by the "dangers of the river," and that defendants used due diligence and caution to avoid it. But whether or not, it was a question of fact to be decided by the jury and not by the court. The court, therefore, erred in giving a peremptory instruction to the jury to find for the plaintiff. The supreme court of New York in *Cott vs. McMechen*, 6 Johnson, 150, and in *Elliott vs. Russell*, 10 Johnson, 1, and the supreme court of Tennessee in *Gordon vs. Buchanan*, 5 Yerger, 72, have

expressly decided that whether a carrier had used due diligence and caution to avoid obstructions, is a question of fact for the jury to decide.

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2. In the progress of the trial, the circuit court excluded evidence offered by the defendants, which seems to me was relevant and proper to be considered by the jury.

I will give a few examples. Jamison, the pilot, was asked this question by defendants' counsel: "Whether spars and anchors could or could not have been used to any advantage in getting the boat off?" Plaintiff objected to the question, and the court decided it was incompetent. The witness was then asked this question: "In the condition the boat was in, what other means of relief was there to get the boat off?" The court rejected the question as incompetent. This question was asked the witness: "Whether or not the use, or the attempt to use the spars and anchors would or not have increased the peril?" Plaintiff objected to the question as illegal, and the court sustained the objection, and would not permit the witness to answer it.

Brashear gave his deposition in which, after stating there had been a consultation between the captain, Jamison, the pilot, Edward Taylor, the first mate, and witness, the second mate, says: "That after examining the condition the boat was in, as carefully as it could be done, we come to the conclusion, unanimously, that there was no other means of saving the boat, which we could possibly resort to, except to throw out so much of the freight on board as would lighten and float her off." The witness was then asked: "Whether or not anything was said in the consultation in regard to spars, whether they could be used to any advantage? State all that passed on the subject." The court would not permit the question to be answered. The witness was then asked: "Whether or not anything was said in the consultation in regard to the peculiar danger the boat was in, as to how she might be lost,

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and as to whether that was an event soon to happen?" This question and the answer to it were excluded by the court from the jury.

These are only a few of the many rulings of the circuit judge against the defendants. It will not require any argument to prove to this court that some, if not all, of the rejected questions, were pertinent to the issue to be tried by the jury. All that occurred at the time of the accident should have been given to the jury, to enable them to decide whether the necessity existed for the jettison. There are some minor questions presented in the record, which have been noticed by my co-adjutors in their briefs, and need not be repeated by me.

Upon the whole record, the counsel for the plaintiffs in error, defendants below, insist: *First*. That the evidence in the record shows that the throwing overboard of the molasses was an act of necessity, which was not caused either by the negligence or lack of skill of the officers on board the Glendy Burke; that it is embraced in the exception in the bill of lading, "dangers of the rivers." *Second*. But whether the evidence is or not conclusive, it certainly conduced to establish the defense set forth in the answer; and that being the case, the jury were the constitutional triers of the facts. Upon these two points alone, the judgment of the circuit court is erroneous and should be reversed.

Speed & Worthington for appellee—

The court will perceive from the record, that the answer was filed in the clerk's office, and before the first term of the court. Bustard's counsel predicated the motion for a judgment, as to all but leakage and cooperage, upon the insufficiency of the answer. That motion was not made before the answer was filed. Injustice is done to Bustard's counsel, as we respectfully suggest in the opinion as now drawn, in leaving them to make the motion at the time indicated in the opinion.

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To the doctrine of jettison, as laid down in the opinion, we do not, in the main, object. But in several places the court says that the current of the river is a *vis major* that may lead to results that will justify a jettison. Is this so? Is not a current usually found in a rising or falling river at a given place, an ordinary and known danger of the river? The testimony in this case shows that a carrier does know the course and effect of a current at a given place. In this case, such knowledge on the part of the carrier is a fact, not a presumption of law. Can he then be heard to say, at a stage of the disaster, either before the first striking or after it, that he had miscalculated the effect of, or was overcome by the force of it? (See *Williams vs. Branson*, 1 *Murphy*, 417, and *Murphy, Brown, & Co., vs. Staton*, 3 *Munford*, 240, and especially Mr. Wirt's argument in the latter case.)

The same argument will hold good as to a high, strong, and steady wind. The carrier who enters a narrow and difficult pass in a strong wind, ought not to be permitted to acquit himself of a disaster, by reason of the effect of winds and currents, which were known to him when he entered. If overtaken in the pass by an overwhelming gust or squall, it would not be an ordinary accident. If, after striking the first time, and there was no injury from such striking, and no danger in remaining there until daylight, or the wind subsided, can a carrier say that he was overwhelmed by darkness, currents, and wind? All these were known and impending dangers, not sudden and unexpected.

We think that the opinion as now drawn, ought to be essentially modified, in each of these particulars.

We did not mean to say in our argument, as the court seems to have understood us, that it could not be shown without a trial, that spars and anchors could not have been used to advantage. We meant to say that it could be shown that spars and

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anchors were not commonly resorted to on quick-sand bars, and were of no use there. So we understood the court below. If spars and anchors are commonly used and resorted to on such bars, then the carrier cannot excuse himself for not trying them. There is nothing like trying. If any sensible, discreet, and skillful boatman would say that spars and anchors could have been used with benefit, or that it is usual and common under such circumstances, and in such a place, to have tried the effect of them, the carrier ought to have made the experiment.

We think that there is but little difference betwixt the opinion before us, and that of the court below, as we understood it. The court below offered to admit proof that spars and anchors were not resorted to on quick-sand bars, but excluded the proof as to their being of no use in a case hypothetical in the question. The opinion is somewhat indefinite, or not so definite as to give a practical rule for another trial.

With great deference we still suggest that the answer is not a full defense.

The suit is for failure in a carrier to do his duty. For defense the carrier says that he discharged his duty. Now, what was the duty discharged? He committed a justifiable jettison. Is his duty fully discharged, when he throws a part of the cargo into the river, and saves the boat and the remainder of the cargo? Was it not his duty to bring up and deliver what was not sacrificed? Was it not equally his duty to render an account, a general average account?

We think the authorities cited in the written brief heretofore filed, are express to that effect. Suppose that the carrier had failed to deliver the cargo of Bustard that was saved, and had converted it to his own use, could we not have recovered for it in this action? To deliver what remained after the jettison was his plain duty. To make up a general average account was also his plain duty. If the carrier has

failed to do that, Bustard cannot recover of the carrier, because the jettison was justifiable and regular, and he cannot recover his average, because the carrier has failed to render the necessary and proper account.

To go acquit the carrier must do his whole duty.

It may be inferred from the opinion, that the carrier may be sued in another action, for a failure to discharge the duty of rendering an account. This is cutting up a contract into parts. The carrier is sued for a breach of his duties or obligations; he pleads a fulfillment in all but one important and vital particular, and says, that as to that the shipper shall be answered, when he sues for its non-performance. The duty not performed flows from, and is of necessity connected with the original contract. The carrier ought in his answer, to justify as to the jettison, show a general average account, and let judgment go for his share of the general average.

B. Ballard on the same side—

The brief of Messrs. Speed & Worthington, is quite full upon most of the points involved in this case, but I still desire to add a few suggestions.

1. The answer discloses the fact that the boat struck on "Montezuma Bar," that is on a *known obstruction*. This being so, the carrier is liable, notwithstanding the other general statements of the answer, and notwithstanding the exception of "dangers of navigation" contained in the bill of lading. Such an "exception" does not excuse a carrier from liability, from a loss arising from his vessel striking on a bar or other obstruction, unless it be a hidden one, newly placed in the river, and "of such a character that human still or foresight could not have discovered or avoided it." (*Gordon vs. Buchannon*, 5 Yerg. Tenn. Rep., 72; *Turney vs. Wilson*, 7 Yerg., Tenn. Rep., 240; *Williams vs. Branson*, 1 Mur. N. C. R., 417, *Angel on the Law of Carriers*, p. 168.) These authorities contain, I think, a

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fuller exposition of the exception commonly contained in bills of lading, than can be found elsewhere.—The attention of the court is especially invited to the cases of *Turney vs. Wilson*, and *Williams vs. Branson*. In the last case the court say: "If the situation of the rock or shallow, be generally known, and the ship be not forced upon it by adverse winds or tempests, the loss is to be imputed to the fault of the master."

There is no intimation in the answer of Bustard, that the "Glendy Burke" was forced upon "Montezuma Bar" by adverse winds or tempest, and therefore the answer was bad; and upon the facts disclosed by it, the plaintiff was entitled to recovery.

The statement contained in the answer, that the grounding was unforeseen, unavoidable, &c., is a statement of a conclusion of law, and therefore bad. If this sort of pleading was good under the old system, which consisted rather of statements of conclusions of law than of facts, it is not good under the *Code of Practice*. Under the old system, *nil debit* was a good plea in certain actions of debt, and *non assumpsit* in actions of assumpsit. But these pleas are obviously conclusions of law upon facts, and since the *Code* requires the facts to be set forth in the pleadings, such pleas or their equivalents, would be bad under the *Code*. The decisions under the *New York Code* have been in accordance with these views.—(See *Van Suntwood's Pleadings*, 259; *McMurray vs. Thomas*, 5 *How. P., N. Y. R.*, 14; 8 *Barb. S. C. R., N. Y.*, 250.) Now whether the grounding was unforeseen or not, or unavoidable or not, depends on the facts, and these facts the *Code* requires should have been set forth.

But the facts which might have justified the grounding, to-wit:—that it occurred on a newly formed bar, or was caused by winds or tempests, are not set forth in the answer, and therefore it is bad; nor are they disclosed by the proof, and therefore the plaintiff is entitled to judgment.

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2. The answer sets forth that the boat "run on Montezuma Bar. The defendants immediately endeavored to back her off with the engines, and in doing so, she *swung* broadside on the bar and stuck fast, and was thus grounded; she run on the upper end of the bar, and *swung* with her broadside on it." The obvious meaning of this is, that the bow of the boat never got free from the bar on which it struck, but that the bow stuck at the place it first struck, and that the boat swung around on the same bar. But it was attempted to be established by the proof, an entirely different state of facts. It was attempted to be proven that after the boat got loose from the bar she first struck, she floated back and struck her stern on another bar and then got fast; and that in the opinion of witnesses, spars and anchors could not have been used there. It seems to me, that all such proof was irrelevant and inconsistent with the answer.

3. Witnesses generally are required to state facts; these opinions are not ordinarily allowed to go to the jury. But when the subject of inquiry is a matter of science or peculiar skill, scientific, or skillful persons are allowed to give their opinions. However, to enable them to express an opinion, it must first be established to the satisfaction of the court, that they are really skilled in the matter about which their opinion is asked, and then their opinion must be based upon the facts proven, and not partly upon facts proven, and partly upon facts not proven.— Now, in this case, considering that the getting a boat off a bar is a matter of skill, it was not, I think, sufficiently shown that the witnesses who were asked their *opinion* as to the practicability of using *spars* and *anchors*, were really skilled in the business about which their opinion was asked; and in the question propounded to them, *facts* were assumed to exist, which were not set forth in the answer; which were not proven; and which did not exist in fact. I more than doubt, whether it is good practice to allow a hypothetical question to be propounded to a witness,

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before the facts which prove the hypothesis are established, because such practice may tend to confuse, embarrass, and mislead the jury. The facts assumed might not be thereafter proved, and yet few juries could exclude from their minds, all traces of the answers to the hypothetical questions; indeed, the false hypothesis may be so often repeated, that the jury might assume the hypothesis to be true.—The better and safer practice, and the only one that is tolerated, is *first* to establish the facts and then examine the experts. But, be this as it may, if a party has not been allowed to put an hypothetical question, he has not been prejudiced, if the facts hypothesized were not at some stage of the case proven. Now in this case, all the facts assumed in the hypothetical questions propounded by the defendants to their witnesses, were not proven, and hence they were not prejudiced, even if there had been no other objection to the question.

I have not intended to argue the points here presented, but simply to state them, relying that they will be sufficiently apprehended from their statement.

February 5.

Chief Justice MARSHALL delivered the opinion of the Court.

This action, by ordinary petition, was brought on the 9th of March, 1853, by E. Bustard against Bentley and others, as owners of the steamboat Glendy Burke, of which J. Bentley was captain or master, to recover damages for the non-delivery of a large quantity of molasses, in barrels and half barrels, part of that which had been received by the boat at or near New Orleans, to be transported to and delivered at Louisville or Portland, the dangers of the river and fire only excepted. The bill of lading containing the number and marks of the barrels, and the contract for transportation, is referred to and filed with the petition, and is in the usual form, except that it has at the end, and above the signature, the following clause: "Not responsible for leakage or

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cooperage." The petition, however, alleges that the barrels, &c., delivered, were not in as good condition as when received, by reason of which the plaintiff had been compelled to expend a named sum for hoops, &c., including which he claims as the balance due him, after deducting freight, the sum of \$4,129, afterwards stated in an amendment to be \$4,114 83, for which he claims judgment, &c.

The defendants demurred to the petition, and on the demurrer being overruled, moved that the demand for leakage and cooperage should be stricken from the petition, which was refused. The plaintiff moved for a judgment for the amount claimed, except for leakage and cooperage. These motions were overruled, and the defendants filed their answer, in which, besides denying their responsibility for loss by leakage and cooperage, they show that the non-delivery of the molasses, for which the plaintiff claims compensation (except that which was lost by leakage of the barrels delivered from want of proper cooperage,) was caused by a jettison or throwing overboard of the barrels and half barrels not delivered, under circumstances in which it was deemed necessary, and ordered by the master on consultation with the other officers concerned in navigating the boat, as the only means of saving her and the residue of the cargo, the aggregate value of which, with the freight, they say, was over \$90,000. And they aver that this loss was occasioned by the dangers of the river, for which they are not responsible by the bill of lading.

In excuse or justification of the jettison, they allege that the boat left New Orleans well officered and well manned, took on board, on her way, the plaintiff's cargo, and was duly prosecuting her voyage up the Mississippi, for Louisville, when, on the night of the 5th of February, and about five miles below Helena, in Arkansas, being under way, she run on Montezuma bar; that efforts were immediately made to back her off with the engines, and in do-

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ing so she swung broadside on the bar, and stuck fast, and was there grounded; that she run on the upper end of the bar and swung with her side on it; that all means within the power of the defendants were used to get her off, but the bar was a quicksand bar, the river was falling rapidly, and the current and wind strong against the boat and the bar, pressing the boat upon the bar, and the night was very cold; that on account of the softness of the bar spars could not be used; that lighters of sufficient capacity to relieve the boat could not, so far as known, be procured, and the time necessary for procuring any would have exposed the boat and cargo to too much danger of loss; that in this condition the boat and cargo were in imminent danger of being lost, and the master upon consultation, deliberately determined that the only alternative to save the boat and cargo was to resort to a jettison; that he then caused 338 barrels and 285 half barrels of molasses, and 21 barrels of oysters in the shell, to be thrown overboard, which so lightened the boat, that with the use of the engines she was got afloat, and then proceeded on her voyage to Portland and Louisville, and delivered the remaining part of her cargo, 244 barrels and 274 half barrels of the plaintiff's molasses having been thrown overboard; and that the part of the cargo thrown overboard was the most convenient to reach, the least valuable, and the heaviest. And the answer states that the jettison was necessary to save the boat and the residue of the cargo; that the grounding was an unforeseen accident, inevitable and unavoidable, and happened without any fault or negligence of the defendants or their agents; and that the loss of the molasses thrown overboard was caused by dangers of the river, for which by the bill of lading they are not liable, and that because of the jettison they could not deliver it. The defendants further say that if any loss occurred from leakage, of which they know nothing, it resulted from neglect of plaintiff's agents on account of defective coo-
perage

and barrels, without fault on their part; and they deny that the part delivered was not in as good condition as when received. In an amended answer, filed during the trial, they state that the barrels of molasses received on board of the Glendy Burke were in bad order, and had leaked very much when the jettison took place; that some of those thrown overboard were nearly empty, and that those thrown overboard had leaked and wasted at least \$——. The objections of the plaintiff to the filing of this amendment were overruled; and to the opinion of the court overruling the objection, as well as to the other opinions before mentioned, exception was taken by the parties respectively.

The plaintiff demurred to the original answer, but the demurrer was overruled, and a jury impanelled, who, after hearing the evidence, and being unable to agree on a verdict, were discharged, and the cause was continued. At a succeeding term a trial was had, which, after the exclusion, by the court, of all testimony going to show the opinions of various persons engaged in navigating steamboats on the Ohio and Mississippi rivers, that spars and anchors could not have been used with any effect at the place and in the condition in which the boat was, and under instructions from the court that the plaintiff could not recover for damage by leakage and cooperage, and that the defendants had not made out the defense of a justifiable jettison, and that upon the whole evidence they must, as to the jettison, find for the plaintiff, resulted in a verdict for the plaintiff for \$3,857 48 in damages, for which sum judgment was rendered in his favor. The defendants excepted to the opinions of the court excluding the evidence respecting the utility of attempting to use spars and anchors; and also to the instruction given as to the jettison. The plaintiff excepted to the instruction to find against his claim for loss by leakage and cooperage, and also to the opinion overruling his objec-

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tion to the competency of Jamison, the pilot of the boat at the time of the jettison.

The motion of the defendants for a new trial, founded mainly upon the exclusion of the evidence above referred to, and upon the instruction to find for the plaintiff as to the jettison, having been overruled, they have brought the case to this court, assigning errors covering all the decisions of the circuit court against them. The plaintiff has assigned cross errors, questioning all of the decisions against him, except upon his motion for a judgment for all of his demand but that for leakage and cooperage.

Some of the questions thus presented are of minor importance. Others are of a magnitude not exceeded by any which can arise respecting the navigation of our great rivers, and the rights and duties of owners and masters of steamboats navigating them with freight. Those of the former class we shall barely notice, without enlarging upon them.

1. Although a fact which might bar a recovery, ought properly to be negatived in a petition on a covenant, and is not negatived, yet if in the answer it be set out and relied upon as a defense, it forms an issue in the case, and no reversal should take place for a failure to make the averment in the petition.

The defendants' motion to strike out so much of the petition as relates to the demand for loss by leakage and cooperage, was properly overruled, because that part of the claim, and of the petition, involved the charge of deterioration of the barrels during the voyage, by the fault of the defendants. Besides, the object was afterwards fully answered by the instruction of the court on that subject. The plaintiff's motion for judgment, except as to leakage and cooperage, seems to have been made soon after the demurrer to the petition was overruled, and on the same day, and immediately before the filing of the answer which removed all ground for it. The filing of the answer, though in the same order, is stated after the overruling of the plaintiff's motion. But if the answer was first filed, and if the motion had been granted, an inquiry as to damages would have been still necessary, and the effect of the motion was substantially attained by the instruction as to the defense of jettison. The amendment of the answer made during the trial, does not appear to have been prejudi-

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cial to the plaintiff. The demurrer to the petition, which seems to have been founded upon its failure to aver that the loss for which damages are claimed was not occasioned "by fire or dangers of the river," was, as we are inclined to think, properly overruled, because the non-delivery of the cargo was *prima facie* a cause of action, and the matter of excuse or justification under the exception, seems properly to come from the defendant, within whose knowledge it lies. If the plaintiff had negated the application of the exception, it would have been a mere formality, which would not have thrown the burthen of proof upon him, nor excused the defendant from showing, by pleading and proof, that the loss, or non-delivery of the cargo, was occasioned by one of the excepted causes. But if this were not so, and if the petition, standing alone, should have been adjudged to be insufficient for want of a negative allegation that the non-delivery had not been occasioned by one of the excepted causes, we are satisfied that the defect was cured by the answer, which, professing to set out the cause and manner of the loss, avers that it was occasioned by one of the excepted causes, and thus makes a part of the issue the very fact which was omitted in the petition. And as that fact being included in the issue, must have been determined one way or other as certainly as if it had been negated in the petition, it would be worse than useless to send the case back for a formal negation by the plaintiff of a fact which was already embraced in the issue, and already and certainly negated by the verdict. If, therefore, there be in such a case no error affecting the trial, and the verdict be sustained by the evidence, the court would not, after verdict, reverse the judgment for a defect of this kind, even though it might be fatal on demurrer; because, upon the whole record; the plaintiff would appear to be entitled to judgment.

We pass, then, to the answer, which not only admits the non-delivery of a large portion of the plain-

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rier of goods by steamboat, for a casting overboard the goods, and their total loss to the shipper, the defense must show that it resulted from the dangers of the river, which could not have been avoided, and that the jettison was "rendered necessary by circumstances, over which the defendants and their agents and servants had no control, and which could not have been avoided by the exercise of that vigilance which was appropriate to their respective stations, and called for by the navigation on which they were engaged, and when there was no reasonable means of avoiding a total loss, but by sacrificing a part of the property at risk, for the safety of the residue."

3. The fact that a steamboat navigating the

tiff's goods, as alledged in the petition, but avows as the cause of non-delivery, that they were thrown into the river, and thus destroyed or lost, by the willful and deliberate act of the master and other agents of the defendants. But in order to make an act so obviously injurious to the shipper, and apparently so contrary to the undertaking and duty of the carrier, operative in itself as an excuse for the non-delivery, and a defense to the shipper's action for the apparent breach of contract, the act itself must be shown to have been caused by one of the dangers of the river, which could not have been avoided, and to have been rendered necessary by circumstances over which the defendants, and their agents and servants employed in the navigation of the boat, had no control, which they could not have foreseen and guarded against by the exercise of that vigilance which was appropriate to their respective stations, and called for by the character of the navigation in which they were engaged, and which, when they actually occurred, left no reasonable means of escaping a total loss but by sacrificing a part of the property at risk for the safety of the residue. If a power of such magnitude must be conceded to the navigators of steamboats in our interior streams, it furnishes a most potent reason why not only the boats themselves should be staunch, well equipped and competent in every respect to meet all ordinary difficulties of the intended voyage, but why, also, the masters or others, at whose discretion a portion of the cargo entrusted to their care may be destroyed with impunity, or at the common charge of all concerned, should possess that skill, and experience, and care, which would enable them, as far as practicable, to avoid or overcome danger, and that discretion and firmness which might prevent a sacrifice under the promptings of timidity, or of needless despair.

The single fact that the boat is in such a situation at the time of a jettison, as that, in all reasonable probability, a total loss of both vessel and cargo must

ensue if immediate relief be not afforded, will not justify the carrier, or his agents, in resorting to the extreme measure of casting overboard, and thus destroying, a portion of the cargo, so as to throw the loss upon all who may be benefitted by the sacrifice, (though it be at the moment necessary, and prove successful,) unless the crisis come without fault, that is, without the want of due care in avoiding, and due skill, and diligence, and exertion, in overcoming the evil. If, by the use of proper care, and skill, and diligence, and exertion, or activity, the necessity for the sacrifice might have been avoided; or if, though the danger and the crisis could not have been avoided, the sacrifice is thought necessary, and is made only to prevent harm to the boat, or to expedite her on her voyage, the carrier, on account of his fault in the first case, and because in the other he alone is benefitted by the sacrifice, must alone bear the consequent loss. The carrier, even under the exception of dangers of the river, is responsible to the shipper, not only for losses which occur by reason of the insufficiency of his boat, or its equipments, but for those, also, which are occasioned by the incompetency of those whom he employs in its navigation, or by the want of reasonable care, and skill, and diligence in the particular circumstances which have occasioned the loss. And that reasonable competency, including care or prudence, and skill, and diligence, is that degree of these qualities and experience which is usual among those employed in the same navigation, such as its nature and ordinary dangers and difficulties require, and which the public has, therefore, a right to expect from all who undertake the transportation of property and persons in that navigation.

By the common law, the common carrier, whether by land or water, and whether engaged in external or internal navigation, could excuse the non-delivery of the goods received for transportation, only by showing that it had been occasioned by the act of

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western waters, is placed in a situation that in all reasonable probability a total loss will ensue, unless a jettison take place of part of the goods, will not justify the jettison and excuse the carrier, unless the crisis come without fault, (i. e.) without due skill and diligence in overcoming the evil; a jettison will not be justified on account of probable injury to the boat, or a desire to expedite the trip, or if it occur from the insufficiency of the boat, or negligence, or incapacity of those engaged in navigating it.

4. By the common law, the common carrier was in effect an insurer against all loss, except loss by the act of God, or the

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King's public enemies, and jettison was not justifiable unless rendered necessary by one of these causes. Subsequently an exception was introduced into the contract by carriers on sea, of the "damages or perils of the sea," which denote natural accidents peculiar to that element, which do not happen by the intervention of man, nor are to be prevented by human prudence. (3 *Kent's Com.*, 216, 217.) The peril must appear to have occurred without fault. (*Abbot on Shipping*, 258.)

God, or by the king's (that is, public) enemies.—Against losses otherwise occasioned, unless by the fault of the shipper or owner of the goods, he was, in effect, an insurer. Under this rule of responsibility, a jettison, or the throwing overboard of a part of the goods, did not excuse the non-delivery, and therefore was not, as between the carrier and the shipper, justifiable, unless it was done under a necessity occasioned by the act of God or of public enemies.

The right and law of jettison, had its origin and growth, as a law of the sea, in the navigation of which, the loss of the vessel involved not only in most instances, the loss of the cargo, but generally the loss, and always the hazard more or less imminent, of life. And we sometimes find the rule exempting the carrier from liability on the ground of this right, laid down as if depending upon or growing out of a necessity of throwing goods overboard for the preservation of the vessel *and crew*, in a tempest, (2 *Kent's Com.*, 603,) or in extremity produced by other causes coming within the common law exceptions to the undertaking of the the carrier. The extreme rigor of the rule of liability, applicable to carriers by sea, who necessarily incur much greater hazards than are ordinarily incident to transportation by land, has in modern times been mitigated, by introducing into the contract for transportation and delivery, the exception of dangers or perils of the sea, in addition to the two exceptions of the act of God and the king's (or public) enemies, recognized by the common law. And as under the common law exceptions, the carrier was not liable for the non-delivery of goods thrown overboard, under a necessity caused by the act of God or the public enemies, so to give him the reasonable benefit of the exception of the perils of the sea, when expressed in the contract, he is not liable for the non-delivery of goods thrown overboard, under a necessity caused by a peril of the sea. In either case, and in the one as

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certainly as in the other, if the jettison be rendered necessary by one of the excepted causes, as by the act of God or a peril of the sea, the loss occasioned by the jettison, is a loss occasioned by the cause which rendered the jettison necessary, and thus justified it, and is therefore a loss coming within the exception, and for which the carrier is not liable, except with all others concerned in proportion to the benefit derived from the sacrifice. But while it is generally easy to determine whether the loss has been occasioned by lightning, tempest, earthquake, or other act of God, it is often difficult (*as said by Ch. Kent, 3d Com., 217.*) to determine whether the disaster happened by a peril of the sea, or unavoidable accident, or by the fault, negligence, or want of skill of the master. "Perils of the sea (*same book, page 216.*) denote natural accidents peculiar to that element, which do not happen by the intervention of man, nor are to be prevented by human prudence."

It is more pertinent, however, and more profitable to consider the examples given by which to determine whether the disaster has happened by a peril of the sea, than to attempt any deduction from the expressions used in defining such a peril. "If, (*says the same author, 3 Kent's Com., 217.*) a rock or sand-bar be generally known, and the ship be not forced upon it by adverse winds or tempests, the loss is imputed to the fault of the master. But if the ship be forced upon such rock or shallow by winds or tempests, or if the bar was occasioned by a recent and sudden collection of sand, in a place where ships could before sail with safety, the loss is to be attributed to a peril of the sea." The same rule of discrimination, and in the same words, is stated by Abbott in his work on shipping. (*page 258.*) also by Story on bailments, and by other authors who need not be referred to.

Under this rule and from what has already been said, we must conclude that if a vessel transporting goods on the sea, under a contract containing the ex-

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tion of a jettison of goods.

ception of perils of the sea, should, by running on a bar, such as is described in the last member of the rule, and in such a place, come without fault on the part of the navigators into such a perilous condition as to render it necessary for the common safety, that a part of the cargo should be thrown overboard, such jettison would be justifiable, and the carrier would not be held responsible upon his contract, for the non-delivery of the goods thus destroyed. And although the necessity for preserving life is sometimes, it is not always referred to in stating a proper case for a jettison, (as in *Abbott on Shipping*, 142.) But as property alone is destroyed by the jettison, it would seem to be sufficient in point of reason, to justify the destruction of a small part of that which is at risk, that such sacrifice was necessary for the preservation of the residue of much greater value, though no life was at hazard, provided the necessity for the sacrifice has arisen without fault on the part of him who has charge of and is responsible for the whole. And we suppose the preservation of life has been referred to in connection with the necessity of a jettison, rather on account of the fact that the danger of the vessel commonly involved hazard to the lives of those on board, than as a serious indication that a jettison might not be justified, unless it were necessary for the preservation of life as well as property. Surely, the master would not be justified in abandoning the ship and cargo to a total loss, merely because he and all on board could save themselves without difficulty, or were in no danger, when by the sacrifice of a small portion of the cargo, the entire residue with the ship might be saved. The fact that the hazard of life to the crew and others is involved in the danger of the vessel, would, doubtless, increase the importance of the crisis, and render more urgent the necessity of doing whatever might be done to insure the common safety. But we do not perceive that it should be absolutely essential to the justification of a jettison.

The exception of the dangers of the river in the bill of lading now before us, bears a strong analogy, *matatis mutandis*, to the exception of perils of the sea. And there seems to be no good reason why the same definition, with the substitution of river for sea, should not be applied to each; nor why the same principle which determines the liability or non-liability of the carrier by water, under the one exception, should not also determine it under the other. The principle that the carrier should provide a vessel, in strength and equipments suitable to the voyage which he undertakes, and that he should furnish her with officers and men, competent in number, and in the qualities requisite for the particular navigation, is alike applicable to both cases; and there can be no ground for discrimination upon the question of his liability for a loss occasioned by a want of reasonable care, or skill, or diligence in those whom he has employed as his agents in the transportation of merchandise. Nor should there be any as to his non-liability for accidents peculiar to the element on which his vessel is borne, and to the navigation he is engaged in, and which do not happen by the intervention of man, nor are to be prevented by human prudence. By which we understand that degree of prudence which is usually found in discreet men, under similar circumstances, and is to be reasonably expected from those who are engaged in the particular navigation.

There are, it is true, differences between our rivers and the sea. But although these may produce a difference in the circumstances of the case, and some difference or even difficulty in the application of the same principle of liability or non-liability, we do not perceive that they should necessarily produce any difference in the principle itself. It is said that there are maps and charts of the ocean, by which the navigator is shown the course which he should pursue, and the dangers which he is to avoid. But the new discoveries continually made, and the constant im-

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6. The same rules, without relaxation, which apply to a justification for a jettison at sea, where the perils of the sea are excepted, apply to a jettison on the Ohio and Mississippi, under the exception of the dangers of the river.

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provements and additions to existing charts, show that the great ocean is yet but imperfectly explored, while the numerous shipwrecks annually occurring, show how little maps and charts avail against rocks and winds and storms, to which the navigation of the sea is subject. And what are maps and charts, even as guides upon the ocean, which must forever remain trackless, compared with the shores of our rivers, always in sight of the navigator, and with the successive objects upon them, soon becoming familiar, and which, as landmarks, enable him at a glance to know not only where he is, but what known obstacles or dangers he is approaching. The narrowness of the rivers, too, while it facilitates his knowledge of the stream and its obstructions, or other difficulties, diminishes the danger which might otherwise arise from an accident produced by a peril of the river, and not involving the immediate destruction of the boat, by the facility which it furnishes, from the proximity of the shore, of removing persons and property to a place of safety. We find in the comparison thus far, nothing which should relax in favor of the carrier upon the Mississippi and Ohio rivers, the rule of diligence and skill, or the principle of liability, as established with respect to carriers by sea, under the exception by contract, of perils of the sea. And to pursue the parallel still further: If the rivers have currents, and are subject to winds and storms, which may counteract the efforts and skill of the helmsman, and drive the boat from its course, and ground or strand her: so there are currents and tides in the ocean at least as strong, and winds and tempests much more powerful, occurring, too, when there is no port or shore or anchorage at hand, which may afford protection. So, if there are islands, and bars, and shoals, and snags, in the rivers, there are also islands, and bars, and shoals, and rocks, open or concealed in the ocean; and if there may be new formations of sand in the rivers, there may also be in the sea new formations, not only of sand, but of

rocks thrown up by volcanoes, and which are either raised above or remain concealed beneath the surface of the water.

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It is to these circumstances, as to which, so far as they may effect navigation, there is a considerable analogy between the rivers and the sea, that the rule quoted from Kent and Abbot applies. The obstructions themselves may be considered as natural causes or facts, existing without the intervention of man, and peculiar to the element, whether sea or river.— And although the obstruction be known, yet, if notwithstanding the exercise of reasonable care and skill, the vessel be driven upon it by extraordinary wind, or tempest, or as we add, by the current of the river, whose force and direction could not have been reasonably anticipated, nor its effects avoided by proper skill and exertion, all of which are natural forces; or if the obstruction be unknown, and be at a place where vessels passed before in safety, the accident of the vessel in either case, running and grounding upon such obstruction, without fault of the navigators, is attributed to a peril of the sea, if the navigation be upon the sea, or should equally, as we think, be attributed to a danger of the river, if the navigation be upon it.

But if on the other hand the obstruction be known, and the vessel run upon it without being driven on it by the superior natural force of wind and tempest, the law of the sea makes the carrier liable for any loss occasioned by the accident, upon the assumption that not being the result of the superior force of natural causes, it might have been prevented by human prudence, that is, by the exercise of reasonable care and skill, and is to be attributed not to a peril of the sea, but to the fault or deficiency of the navigator. And to the application to the carrier on the river of this branch of the rule, with the qualification of adding the current of the river as one of the natural forces which might, by counteracting the reasonable exertions of care and skill on the part of

7. If an obstruction in the river be known, and a vessel run upon it, or upon the shore, without being driven by force of wind or current of the river, which could have been prevented by proper care and skill, a jettison will not be justified. By known obstructions is meant, such as were known to navigators of the stream generally, or to the navigators of the particular

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boat, or discoverable by them by the exercise of reasonable vigilance. (See 4 Yerger, 57; 5 Ib. 7, 7 Ib. 340.)

the navigator, and without fault on his part produce the accident, there can, in our opinion, be no reasonable objection, unless the carrier on the river is to be absolved from the exercise of reasonable care and skill. We think the carrier is to be held liable for every loss occasioned by an accident, which, by the use of reasonable care and skill, and prudence, by the navigator of his vessel, might have been prevented. And, therefore, we have, in our exposition of that branch of the rule which excuses the carrier, for the vessel being driven by winds, &c., upon a known obstruction, expressed the qualification, necessarily to be understood in the rule itself as quoted, that the accident must occur, notwithstanding the exercise of reasonable care and skill to prevent it.

It will be observed that we have included among the obstructions which may aid in causing an accident, attributable to dangers of the river, not only islands, and bars or shoals, but also snags, and we might say, the shore itself. The principle being, that if the boat, while pursuing the usual course or channel, runs and grounds upon one of these obstructions, which is unknown to navigators, the accident is attributed to a danger of the river, but if it run upon one which is known, it is not attributed to that cause, unless it be driven upon it by one of the natural forces to which we have referred, and notwithstanding the reasonable efforts of the navigator. The same principle of discrimination between the known and the unknown, applies to the shifting of bars, or the formation of new ones by the rising and falling of the river. But as this property or habit of the river, as well as its ordinary currents, and the effect of ordinary winds should be known, and must be presumed to be known to the navigator, a corresponding degree of caution is requisite, in approaching and passing those places, in which such changes may be expected in the bed of a falling river, and in which the course of the boat may be effected, even by ordinary winds and currents.

We have only to add upon this subject, that in speaking of unknown obstructions, we refer to such as were neither known to navigators generally, nor to the navigators of the particular boat before the accident, nor discoverable by them by the exercise of reasonable vigilance on their part, and in time to have avoided the accident. If the obstruction be thus unknown, the accident of running upon it may properly be regarded as one which could not have been prevented by human prudence or foresight. But if it be actually known to the navigator of the boat, or if being generally known he ought to have known it, or if he might have known it by the use of reasonable vigilance, then, unless the boat be driven upon it by superior natural force, against his proper exertions, it is not such an accident as human prudence and foresight could not have prevented, and is, therefore, not attributable to a danger of the river. The same principle may be applied with regard to winds and currents, with a discrimination between what is ordinary, and should be known and provided against, and that which is extraordinary and not to be anticipated. The conclusion to which we have come in reference to this exception of dangers of the river, and to the criterion of the carrier's liability, though opposed in some degree to the case cited from 11 *Missouri Rvp.*, 299, of *Collier vs. Valentine*, is accordant with the general current of cases cited upon this subject by the counsel for the carrier, and especially with the cases cited from 4 *Yerger*, 57; 5 *Yerger*, 7; and 6 *Yerger*, 340, as quoted by him.

It was necessary that the answer which admitted and professed to justify the non-delivery of a large portion of the plaintiff's goods, and to present a defense under the exception of dangers of the river, should state facts which would show not only a necessity for throwing the goods overboard, when it was done, but also that this necessity was caused by a danger or by dangers of the river.

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8. The answer to a petition to recover damages for a loss by the goods being cast overboard by the carrier, to be good, must show all the facts necessary to justification of the jettison. The averment that the loss occurred by the dangers of the river is not sufficient. It is but a conclusion of law.

The allegation that the accident and loss were occasioned by dangers of the river, is an allegation of a conclusion of law arising upon certain facts, and the facts themselves should have been stated. The averment that the accident was unforeseen, and inevitable or unavoidable, presents no distinct fact. These terms are themselves but conclusions from facts which should have been stated. The fact or facts which prevented the danger from being foreseen, and those which made it unavoidable and rendered it inevitable, should have been shown with reasonable precision and brevity. For we are not requiring a statement of the evidence by which the facts may be proved, but a statement of the material facts on which depend the conclusions of law relied on in the defense. An accident may have been unforeseen, and may, under the particular circumstances, have been at the moment unavoidable and inevitable, and yet may not be properly attributable to dangers of the river; and it will not be attributed to that cause, if by the exercise of reasonable care and skill, it might have been foreseen and avoided.

The boat, in ascending the Mississippi in the night, ran on Montezuma bar. Without drawing any inference of notoriety from the fact that the bar had a name, it is evident, from what has been said, that the running upon it was not an accident attributable to a danger of the river, unless the bar being a new formation or in a new place, was unknown, (in the sense in which we have explained that term,) and was not visible nor discoverable by reasonable vigilance, in time to be avoided; or unless, although it was known or thus discoverable, the boat was, without fault of the navigators, driven upon it by the wind or the current, which counteracted the reasonable exertions of those who were conducting it. The operation of these natural forces in producing the collision, seems to be absolutely negatived by the fact that the boat was going up stream when she struck the bar, while not only the current, but the

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wind also, as alledged, were driving in the opposite direction. The striking or running on the bar which thus occurred in going up stream, may be assumed to have been caused by the power of the engine and the force of steam, presumably under the control of those on board. It was therefore necessary, in order to bring that collision within the exception of dangers of the rivers, to show that the bar was a new formation where boats had before passed in safety, not generally known, and not known to those having the direction of this boat.

Again, as the boat ran upon the bar in her ascending progress, the presumption is, that she ran upon it with her bow up stream; and in that position, the engine being reversed to back her off, she would, when got afloat, be naturally and rapidly impelled, stern foremost, down the stream, by the concurrent forces of the wind, the current, and the engine. And yet in pursuing the narrative of the disaster, as presented in the answer, we find it said that in endeavoring to back her off with the engine, the boat swung broadside upon the bar, stuck fast, and was then grounded. All this was certainly strange and inexplicable, if it happened while her bow was still aground on the bar, which it must have struck on the lower side, and while the boat was operated on by the current, and wind, and steam, all tending to keep her in a direction up and down the channel. But the answer says she ran on the upper end of the bar, and swung with her side on it, the wind and current pressing her on the bar. Of course, this could not have happened, either while the bow was fast where it first struck, and the stern down the stream, or while the boat was actually moving up stream, bow foremost. It must have happened after she was got afloat from the first sticking, and while going down the stream before the engine was reversed, or before it had given her a new headway up the stream; and while thus descending, her stern may have struck on the upper side of some other part of the same or of

the wind and current, bearing it downward. She may thus have been found broadside upon the bar.

This, according to the evidence, was substantially the actual course of events. There seems to have been in fact, as from the answer there may be inferred to have been two collisions, or accidents; the first while the boat was ascending the stream, when probably the bow run upon a bar; the other after she had been got afloat from the first striking, and before recovering her headway, when descending the stream stern foremost she struck another bar, or a different part of the same, and having swung round, came into the position in which the jettison was resorted to, and as alledged, under a necessity then existing, to throw a part of the cargo overboard, as the only practicable means of saving the residue and the boat itself. But in order to show that this necessity, if it existed, and the consequent loss and non-delivery were occasioned by dangers of the river, and therefore within the exception in the policy, it was necessary to show not only that the extreme peril of the boat was the unavoidable consequence of this second striking, and of the action of the wind and current on the boat, not to be averted by reasonable skill and exertion, but that the second striking itself was upon a recent formation, or unknown bar; or that it was caused by force of the wind and current, and in either case without fault on the part of the navigators. And if the situation of the boat which rendered her liable to an accident, not consistent with her proper motion up stream, and which therefore should be accounted for, was the consequence of the first sticking, it should have been shown that reasonable care and skill and exertion, were used in getting the boat off from the first sticking, and in avoiding the second as well as that of the first sticking, was itself caused by danger of the river. And if the part of the river where these accidents occurred, was on account of the number or

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extent and shifting character of the bars, particularly intricate and dangerous, this fact instead of authorizing a relaxation, required an increase of care and skill, and diligence. And finally, if the second striking and the grounding of the boat with her broadside on the bar, where the wind and current were pressing her upon it, be accounted for and traced to dangers of the river which could not have been prevented by human foresight, it would still be necessary to show what particular fact or circumstance beyond the control of the navigators, caused to the boat in the condition described, such imminent danger of immediate destruction, as rendered it necessary for the safety of boat and cargo that a part of the latter should be thrown overboard. And it should be shown that before this extreme measure was resorted to, all other practicable means were tried; or if any usual means were omitted, the cause of such omission should be stated.

The answer when subjected to these tests, growing out of the principles which we deem applicable to the subject, is found to be substantially defective in failing to state facts which authorize the conclusion that either the first or the second striking of the boat was attributable to a danger to the river, and not to the fault of the navigators, and in failing to state the facts which constituted or caused the immediate and imminent danger to the boat and cargo, to be avoided only by a jettison, and which, while they forbade delay, which in many cases might bring relief, prevented the resort to other means of safety rather than to the sacrifice of a valuable part of the cargo. The manner of determining on and making the jettison as stated, seems to be subject to no reasonable objection. But the fact that the master and the officers whom he consulted, thought the jettison necessary, did not make, and do not conclusively prove it to have been so; and as the propriety of their decision and conduct must be passed upon by a court and jury, to whom the questions as to the

to be submitted, it is necessary that the facts relied on to justify their acts and to repel the liability, should be presented in pleading to the court which is to pass upon their sufficiency, as well as in evidence to the jury which is to pass upon their truth.— It may be, indeed, that the carrier may apprehend some disadvantage in submitting to tribunals deliberating in ease and security, the decision upon facts and conduct occurring in the midst of dangers and difficulties, to be fully estimated by those only who encounter them. But the apparent severity of this ordeal is mitigated by the consideration that the law while it does not countenance or justify rashness or inordinate timidity in those who undertake the affairs of others, yet requires from them by implication, nothing more in judgment or action, than that which under the circumstances is reasonable, and may be justly expected from men of ordinary prudence and qualification for the undertaking) and that by confiding the ultimate decision of the facts to a tribunal composed of ordinary men, and by admitting all such pertinent testimony as may elucidate the conduct and motives of those concerned, it ensures the application of this humane and reasonable principle, in the trial of the questions which are to be decided. If when a fatal accident occurs, the main circumstances exist which may characterize the loss as attributable to a danger of the river, if produced without fault or negligence, the court pronouncing the law, must inform the jury that reasonable care and skill and exertion is all that is required from the navigators) and and there is little danger that the jury will subject their judgment or conduct in a crisis of danger, to an unreasonable test, or require from them more than under the circumstances should be expected from ordinary men, professing the skill and discretion appropriate to their station and business.

9. But if a justification be al-

But although the answer is deemed insufficient, because it does not state the particular facts which

are essential to the justification relied on, yet as it does state that the loss was caused by a danger of the river, and by an accident unforeseen, unavoidable and inevitable—that all available means were used for the relief of the boat, showing why some particular measures were unavailable and not resorted to, and that the danger of total destruction was so imminent and immediate as to render the jet-tison necessary for the common safety—and as these general statements, which did in fact include the facts which should have been stated, were adjudged to be sufficient on the demurrer, whereby the defendants were prevented from making amendments which they might have made if the demurrer had been sustained; and as, under the opinion of the court overruling the demurrer, the parties went to trial as upon a valid issue; and as the answer, though defective for want of particular statement, covered in fact the whole case, and was so considered and treated on the trial; and as the evidence introduced by the defendants, and that which was offered and rejected, conduced to prove facts on which the jury might have found a verdict for the defendants, and the judgment thereon would not have been reversed because the answer did not state facts which, being included in its general statements, and therefore in the issue, must have been proved to authorize the verdict, and should have been considered as established by it—we are of opinion that they should not be precluded, by the insufficiency of their answer, from questioning the judgment against them, on the ground of errors in the trial, which may have prevented a verdict in their favor, or from reversing the judgment, if there were such errors. As the answer, although insufficient on demurrer, would have sustained a judgment for the defendants if the verdict had been in their favor, its insufficiency is not such as to justify an affirmance of the judgment against them on that ground alone.

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ledged in general terms, which embraces the particular facts necessary to be proved, and the parties go to trial upon that issue, and evidence offered conducting to show facts, upon the finding of which to be true, the jury might have found for the defendants, and a judgment thereon would have been a bar to any future action. Yet, the defendant should not be prevented from questioning the decision of the court, on the ground of errors occurring during the progress of the trial which may have produced a verdict against them.

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We, therefore, proceed to inquire into the alledged errors prejudicial to the defendants committed during the progress of the trial. The principal and most important of these alledged errors consists in the rejection by the court, in the various forms in which it was presented, of all evidence offered by the defendants which tended to prove, by the opinions of witnesses experienced in the navigation of steamboats on the Ohio and Mississippi rivers, that spars and anchors could not have been used, with any practical advantage, towards the relief of the boat, in consequence of the softness of the bar or sand on which the boat was grounded broadside.— It is not shown that any attempt was in fact made to use spars or anchors for the purpose of getting the boat free from the bar; and it is suggested that the evidence of opinion was rejected, because the attempt to use them was deemed to be the essential and exclusive test of their practical utility, and that this test not having been resorted to, or even attempted, the court was of opinion that the failure could not be justified, nor the actual experiment substituted by mere general evidence of opinion, and that spars and anchors being the usual means of relieving a boat when aground, the failure to attempt their use in this case, was such a neglect as of itself to prove the absence of that care, or skill and diligence, or exertion, which the occasion required, and which were necessary to a justification of the jettison.

10. The defendant in a suit for a loss by jettison, should in his defense be allowed the benefit of proving the fact of a consultation with the officers of the vessel, and of their opinions then expressed with respect to the con-

But while the law requires the use of all practicable means of relieving the boat from distress before resorting to a jettison, we know of no rule which makes the use of any particular means indispensable; and if in point of fact the nature of the bar was such that spars and anchors could not be used at all; or if the situation of the boat, and the circumstances existing at the time, were such that spars and anchors, if they might be used at all, could not be used with any prospect or hope of relief, or of ma-

terial or timely benefit, we know of no principle or rule of law which requires that fatigue, and exhaustion, and exposure should be incurred for the mere name of diligence in making an attempt which reason and experience determine to be hopeless and useless. The modes of using spars and anchors as means of relieving boats when aground—the practicability of using them in particular places of a peculiar character, and their general effect on that which may be expected from them under various circumstances, are matters of skill and experience belonging to the particular art, as to which those who have skill and experience in the subject may, according to the general principles of evidence, express their opinions, either upon facts known to and stated by themselves, or upon facts hypothetically stated to them and proved in the cause by other witnesses.

But at last these opinions, to have any value, must rest upon facts, to be proved as facts, and not as mere matters of opinion. Upon the question whether spars and anchors could be used at all at the place where the boat was aground, the principal fact upon which opinion might be founded, relates to the nature of the bottom, and of the bar or sand at that place, as being of such rarity or density that anchors could or could not take hold upon the surface, and that spars could or could not find a foundation or resting place within the proper distance from the application of the power. The fact as to the density of the sand of which the bar was composed, might be imperfectly or inferentially proved by those who had a general knowledge of it from previous experience. But this general inference, or even knowledge, would hardly account for or excuse the entire neglect of spars and anchors without making some actual test, if opportunity allowed, of the precise nature or condition of the sand composing the bar on which the boat was aground, in order to ascertain whether spars and anchors, or either of them, could be used. The nature of the bar being proved, the

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dition of the boat, and probable means of relief, as showing only that the jettison was deliberately made, & in view of the actual circumstances of the case as understood by those best acquainted with them.

These facts are not conclusive, however, as to the necessity of the jettison.

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question whether spars and anchors could be used at all or not, would scarcely require the skill of an expert for its solution. But the question whether, if the nature of the bar presented no absolute hindrance to their use, the situation of the boat was such as precluded all reasonable expectation or chance of relief by that means, is a much more complicated and difficult question, requiring not only a knowledge or detail of the existing circumstances, but a large share of skill and experience in the management of boats, and in the means of relieving them. And as the opinions of persons possessed of this skill and experience, would often furnish the only means by which ordinary men, unskilled in the particular subject, could come to a just or satisfactory decision, the necessary alternative seems to be, either that no circumstances can excuse the failure to attempt the use of spars and anchors, where there is a possibility of making the attempt, however hopeless it may be, or that the carrier must be allowed to prove, in the only manner in which it can be proved without actual experiment, that the attempt would have been hopeless and useless. (It has already been said that the law requires nothing more than reasonable, that is, suitable skill, and care, and exertion. It does not expect or require that the navigators of the particular boat which has met with loss, should possess or display extraordinary, much less superhuman faculties. It does not hold them, or their employers, liable for their omitting to do what other persons of skill and discretion, in the same employment, would not, under like circumstances, have done or attempted. As all, or each set of, navigators must act upon their own judgment of what, under the actual circumstances, is useful or practicable, so the common judgment or opinion of men of competent skill and discretion, in the art or profession, seems to be the appropriate and peculiar test of that which is reasonable, and of that which should be required of each.) And as these opinions are subject to the ultimate

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judgment of the jury or other triers, as well with respect to their own reasonableness, as with respect to the competency and impartiality of those who deliver them, there would seem to be less danger that the jury would be led into mistake when aided by the enlightened opinions of skillful men, than if left to their own judgment upon the mere facts of the case.

The real question in this branch of the case is, whether spars or anchors could have been used with any effect towards the relief of the boat in her actual situation, or whether the failure to use them contributed in any degree to produce, or continue, or increase the danger which was the ground of the jettison, and of the consequent loss. And this question is one not of law, but of fact, to be decided by a jury, upon such evidence of facts and opinions as, according to the general principles of evidence, is appropriate to such a question, involving the exercise of judgment and skill, and which can only occur in a particular employment or business of art. And as it is understood to be the duty of the master, before making a jettison, to consult the other officers on board, if there is opportunity for so doing, we think the carrier, on the question of his liability for the loss, is entitled to the benefit of the fact that such consultation was had; and, also, of the opinions then entertained and expressed by the officers in charge of the boat, to be proved by those who expressed them, if their evidence is attainable, and, if not, by others who were present, or had knowledge of them. But this evidence should be admitted no farther than to prove the judgment or opinion of the individuals referred to, as expressed at the time, with reference to the actual condition of the boat, and the probable or possible means of relief. And even to this extent it would be admissible to prove only, that the jettison was made deliberately, and upon consultation and advice, in reference to the actual circumstances and necessities of the case, as understood by those

who were best acquainted with them, and were bound to act. It may, indeed, be doubted, whether these opinions, on which, as expressed at the time the jettison was made, were not a part of the *res gestae*, and proveable as such by the testimony of those who heard them. But, be this as it may, they are certainly not conclusive either as to the condition of the boat, or the possible means of relief, or the propriety or necessity of the jettison at the time. And they are inadmissible as to the manner in which the boat was placed, or brought into the situation in which the jettison was thought necessary.

The court having excluded testimony which, according to the foregoing opinion, was admissible, and upon which, in connexion with the evidence before them, the jury might have found a different verdict, the judgment ought to be reversed and a new trial had, unless this court should assume conclusively, which it cannot properly do, that the non-delivery of the plaintiff's goods was caused by the fault of the defendants or their agents, and not by a danger of the river, and an accident occasioned thereby, which could not have foreseen or avoided.

11. A pilot is a competent witness to testify in behalf of the managers of a steamboat sued for loss by jettison alledged to be unjustifiable.

Upon the cross errors, so far as not already disposed of, we remark, that there is no foundation in the record for the complaint that the court improperly overruled the plaintiff's motion for judgment (on the answer of the defendants held good on demurrer,) for the amount to which he would be entitled upon a settlement of the general average, in case the jettison, as alledged in the answer, was rendered necessary by a danger of the river, and which it is contended the master was bound to ascertain and secure. The record does not state that any such motion was overruled, or even made. And if the motion had been expressly made and overruled, we are far from being satisfied that in an action in which the plaintiff claims damages for non-delivery of goods according to the bill of lading, judgment could be claimed upon an entirely different liability,

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which might grow out of facts presented in the answer, as a bar to the actual demand. We have, therefore, deemed it unnecessary to enquire, and certainly unnecessary to decide, whether, in a case of justifiable jettison, constituting a justification for non-delivery of the plaintiff's goods, the master is bound to ascertain and secure the amount due to the plaintiff as a general average, and the carrier is liable for a neglect of this duty. Some allegation of the breach of this duty, if it be one, would seem to have been necessary to fix the liability; and as it was not essential to the answer, as about the present action, that it should show that the master had done anything in relation to the general average, its silence on that subject could not possibly form the basis of a judgment for the plaintiff's share.

A more serious question is presented by the complaint that the court improperly overruled the plaintiff's objection to the competency and admissibility of R. Jamison, the pilot who had charge of the boat when she first struck, and when, in backing off, she was finally grounded, and who was allowed to testify as a witness in this case, without a release. This objection is founded upon the rule laid down in the books on evidence, and established by numerous adjudged cases, that in an action against the principal, for damage occasioned by the *neglect or misconduct of his agent or servant*, the latter is not a competent witness for the defendant, without a release, (*Green on Evidence, sec. 394.*) and the reason is thus stated by the author referred to: "For he is in general liable over to his master or employer, in a subsequent action, to refund the amount of damages which the latter may have paid." And of the amount of damages recovered against the employer, the record will be evidence against the agent, though he may not have been required to defend the action. This rule is said, in the section quoted, to apply to the relation of master and servant, wherever, in its broadest sense, it may be found to exist; and among other

cases stated, is the case of a pilot in an action against the captain and owner of a vessel, for mismanagement while the pilot was in charge; or to a ship master, in an action by his owner against underwriters, where the question was whether there had been a deviation, neither of whom, says the author, is competent to give testimony, the direct legal effect of which will be to place himself in a situation of entire security against a subsequent action.

In this case a judgment of damages against the defendants would not be evidence, for any purpose, against the pilot, in a subsequent action by his employer, because the judgment and damages might be founded wholly upon the impropriety of the jettison as being unnecessary, whether there had or not been any neglect or misconduct in the pilot's management of the boat. This ground of objection to his competency has, therefore, no application to this case.— And although a verdict for the defendants might secure him from responsibility to them for the present loss to the shipper, it does not necessarily follow that it would secure him from responsibility to them for any injury they may have sustained, independently of the jettison, by his negligence or misconduct in some stage of the same disaster. Nor is it certain that the same standard of skill would be applied in an action by the carrier against the pilot, as in an action by the shipper against the carrier, who may have employed a pilot known to possess less than ordinary or proper skill. For these reasons, and because in most cases of disaster in the night, as in the present case, the pilot at the wheel, and necessarily on the lookout, may be presumed to be the only person who knows with accuracy the causes by which it was produced, we think the court did not err in deciding that the witness was competent, however the objections might go to his credit.

With respect to the defective coooperation, and the leakage complained of, we concur with the circuit court in the opinion, that on the evidence in this re-

cord, the plaintiff had no right to recover anything on this account, because the defect existed when the barrels were received, with an express condition of non-liability therefor; and it does not appear that the defect, and consequent loss, was increased by any fault of the defendants or their agents. But on this subject we go still further, being of opinion that so far as at the time of the jettison, the barrels and half barrels thrown overboard, had, without fault of the defendants, lost their proper guarantees, the defendants, even though the jettison be found not to be fully justified, and not a bar to the action of non-delivery of the barrels thrown overboard, are still entitled to a deduction on account of the loss in quantity from the barrels thrown overboard, by reason of the leakage from them, which, without their fault, had occurred before the jettison; which deduction, though it may not be precisely ascertainable, should be made by the jury, upon such data as the evidence may furnish, and should go in diminution of the damages.

Wherefore, the judgment is reversed, and the cause remanded for a new trial according to the principles of this opinion, as preparatory to which the defendants may amend their answer.

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12. The owner of a boat sued for jettison, should be credited by loss arising from leakage, on account of defect in the vessels, when received on board.

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Case 39.

APPEAL FROM CAMPBELL CIRCUIT.

PET. Ea.

1. The right of holding a ferry and its privilege of conveying passengers for toll, is a franchise in which the chancellor may protect the person in possession, not only by affording redress for the past, but to restrain its repeated disturbance; especially if the right has been judicially established. (9 John. Rep., 585.)
2. An executor, who by will was directed to lease out a ferry, and could without uniting the heirs of the testator, maintain a petition in equity to be quieted in the enjoyment of the franchise

16m 790 699
93 17
16m 790
108 721
16m 690
112 676

3. The laws of Kentucky only profess to grant the privilege to ferry keepers, to convey passengers &c. to the opposite side of the Ohio river; and the same power and right is accorded to Ohio State, and to land at any public landing or wharf, or on private property, by leave to do so.
4. The power of Congress to regulate commerce between the States, does not interfere with the right of the States to legislate on questions which concern its own particular interests and those of its citizens, as in ferries, &c., where Congress has not legislated. (12 *Howard*, 318.)
5. The power of the States to regulate ferries, and grant ferry privileges to their own citizens, where a navigable stream divides two States, cannot be questioned; at least unless Congress shall legislate upon the particular question.
6. The act of Congress of 1793 and 1836, or 1853, requiring steamboats to obtain license, &c., does not apply to ferry boats. No intention has been manifested by Congress to assume the control of ferries, or the legislation of the States on that subject.
7. A steam ferry boat acting under a license obtained under the act of Congress on this subject, had no right in virtue of such license, to interfere with the ferry privileges of the appellees, held under the State authority.
8. A plan of a town laid out upon a navigable river, with a space shown upon the plat between the lots and the river, indicating its appropriation to public use; and a sale of lot under such a plat, are circumstances which in the absence of contradictory evidence which show a dedication of such space to public use. Though the establishment by the proprietor of a ferry upon that space would be sufficient to show a reservation of his right, to the extent of the uninterrupted and exclusive use for that purpose. And after an acquiescence in such claim for more than thirty years, cannot be questioned. (8 *B. Monroe*, 256.)
9. The dedication of land by a proprietor, of lands laid out as a town, on a navigable river, to be a common, confers the right on the public authorities of the town to build wharfs and charge wharfage.
10. A license under the U. States to a coasting vessel, confers no right to transport passengers from one side to the other of the Ohio as a ferry boat, and no authority to transport passengers from the Kentucky to the Ohio side of the river Ohio, without a license from the authorities of Kentucky.

The facts of the case are fully set out in the opinion of the court.—*Rep.*

Root & Webster for appellants—

The main questions involved in this case may be stated as follows:

1. The right of Newport to the "esplanade," or strip of ground between the lots in said town and

the river, and the uses and benefits thereof, and herein of the right to wharfage.

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2. The right of the city of Newport to the benefit of the profits of the ferry run by Taylor from said strip of ground.

3. Are the claims of the appellants barred by former adjudications?

4. The right to navigate the Ohio river between Newport, in the State of Kentucky, and Cincinnati, in the State of Ohio, and to engage in the trade and commerce between those points under a license from the United States to carry on the coasting trade.

Before discussing these propositions, we call the attention of the court to the preliminary question as to the jurisdiction of a court of equity in this case, which is denied.

Courts of equity have no jurisdiction where the remedy is complete at law. Where the law affords complete redress, a court of equity will not interfere to prevent an injury. It is only where the wrong is irreparable that chancery will interpose to prevent it. (1 *Marsh.*, 554; *Ib.* 70, and 480; 2 *Ib.* 232.) A doubtful right must be established at law, before equity will enjoin. (3 *Monroe*, 428.) Bill dismissed because the remedy was at law. (4 *Bibb.*, 323; *Ib.* 236.) The chancellor will not wrest the subject from the common law judge to enlarge his own jurisdiction. (2 *J. J. Marsh.*, 12.) The chancellor may interfere to prevent the erection of that which will be productive of great injury—serious and irreparable injury; it will arrest the injury because the matter cannot be tried at law, and the party would be without remedy. (4 *Bar. & Har. Eq. Dig.*, 83; 4 *Hen. & Mun.*, 474; *Att'y Gen'l vs. Hunter*, *Dev. Eq.*, 12.) The chancellor refused to interfere to prevent the erection of a bridge before final hearing, both parties claiming legal right. (*Charles River Bridge vs. Warren Bridge*, 6 *Pick.*, 376.) An injunction refused to secure a claim to a statute privilege, if the right be doubtful. (*Steamboat Co. vs. Livingston*, 3 *Cowan*, 713;

Rep., 19; *Corporation of New York vs. Mapes*, 6 *John. Ch'y Rep.*, 46; 6 *Sim.* 297; 4 *May & Craig*, 487.)

The plaintiffs have two remedies at law, one statutory, to recover \$16 for each time the defendants shall transport any person or thing from Newport to Cincinnati. (*Rev. Stat.*, p. 360, *sec.* 14.) The other by action on the case, which latter is the general remedy for disturbing a party in the enjoyment of a franchise or easement. (1 *Chitty*, 163, 2 *Star. Ev.*, 911 *ed.* of 1837.)

This is a contest between the plaintiff Taylor and the city of Newport, and without any trial at law settling the legal right, and the city being in the possession and enjoyment &c., and having long enjoyed it, the plaintiff seeks to enjoin and restrain that use and enjoyment by injunction.

The circuit court rightfully dismissed the petition.

But to the main questions, and, 1st. The right of Newport to the "explanade" or the slip of ground between the city and the river.

This ground we insist was dedicated to the city, as the facts appearing in the record will clearly demonstrate. When taken in connection with the case of (*Cincinnati vs. White's Lessee*, 6 *Peters* 435; *Rowan's Ex'rs vs. the town of Portland*, 8 *B. Mon.*, 241; *Giltner vs. Trustees of Carrolton*; 7 *Ib.*, 689; 8 *Dana* 61.)

The court is referred to the 1st, 5th and 7th sections of an act of the legislature of Kentucky, passed on the 14th of December, 1795, which purports to vest the lots in trustees, and reserve to the proprietor, James Taylor, the patentee, certain exceptions. The exceptions are as follows: "Except such parts as are hereinafter expressly excepted." Meaning evidently, such parts of the ground comprehended in the said town, as are thereafter excepted, which excepted parts are not vested in the trustees.

It has been argued that this exception applies to that part between the lots and the river, designated

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as the "esplanade," but clearly this cannot be so.— The exception is in the plural ; it speaks of several parts, or more than one. It clearly refers to lots sold, and some of which had been deeded to the purchasers before the passage of the act as mentioned by section 5. Such lots were beyond the control of the proprietor of the town, and the legislature had no power to vest the title in trustees without the consent of the owners, and as they had been conveyed there was no propriety in vesting the title in trustees. Another reason why the exception named in the first section does not apply to the seventh, is, that only one part of the town is mentioned in the seventh section. The language is, "that such part—not parts—of said town as lies between the lots and the rivers Ohio and Licking, as will appear by reference to said plat." The "esplanade" is a unit, it does not consist of several parts as is represented in said section, as will appear by reference to the plat. This act was but confirmatory of what had been done by the proprietor of the town, so far as the town and local public had acquired rights in the town and public grounds, as shown on the face of the plat ; and as to the "esplanade," it is expressly declared that it shall *remain* for the *use* and *benefit* of the town for a *common*.

Those rights were not then for the first time vested in the town, but had been previously dedicated to public use, and were so to remain ; reserving, however, to the proprietor every *advantage* and *privilege* which he had not disposed of, or to which he would by law be entitled. Said act was evidently passed at the instance of the agent of the original proprietor, and as a grant and as confirmatory of an implied grant of rights to the local public, is to be taken most strictly against the grantor, and any reservation inconsistent with the grant itself is void. What advantage then was not disposed of? What *advantage* and *privilege* was James Taylor entitled to at the time of the passage of this act? We say he

and it had become the absolute property of the town of Newport by dedication to the use and benefit of the local public ; nothing remained to be reserved ; he held the mere naked title, and that he held *in trust* for the common benefit of the town. The plat had been filed for record before the act passed, as the act recites, and copies are filed in the record. The proprietor had lost all power over the dedicated grounds (8 *B. Mon.*, 247,) and the authorities there cited.—Also, (9 *Ben. Mon.*, 211 ; 11. *Ib.*, 163 ; 6 *Pet.*, 728.) “That a dedication of land for public purposes may be made by parol is a well settled doctrine.” (9 *B. Mon.*, 201 ; 6 *Pet.*, 431, 723 ; 8 *B. Mon.*) “The location of a town on a navigable river is for the benefit of the river as a highway, and any space between the streets and the waters’ edge, is presumably dedicated to the public as a *common* for public use.

The dedication having been made and proved by the map, and the sales and conveyance of the lots with reference to it, did not require a subsequent use to prove. (8 *B. Mon.*, 249-50.) But the facts in the case clearly show that the trustees and authorities of the town have exercised authority over the ground called the “esplanade,” for thirty, or perhaps fifty years ; making large improvements, wharfs, &c., and preserve the banks from washing away ; and collecting wharfage, &c.

It is insisted that the right of the town to the wharfage is clear. See the *Act of February, 24, 1834.*

The right of ferry is grantable by public authority only ; standing upon different ground from that of charging and collecting wharfage. (4 *B. Mon.*, 258.)

We now come to the second proposition.

The right of the city of Newport to the benefit and profits of the ferry run by the plaintiff from the strip of ground between the town and the river Ohio. The grounds on which it is claimed have been stated.

We are aware that since the act of 1806, this court has ruled that such grants are confined to those holding the title to the soil. And as the act of 1795, heretofore referred to, reserved the legal title in the proprietor to the "Esplanade," if anything, the only grant made to him after the jurisdiction was conferred upon the county courts, was the grant of 1807, when he held the legal title in *trust* only, upon which the grant was grafted, and he held it for the use and benefit of the town; and it is insisted that the use by the trustee of the trust property for any length of time, should not create a right in the trustee, to the prejudice of the right of the city.

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3. Are the claims of the defendants barred by former adjudication? It is not supposed that the decision of this court, in the case of *The Trustees of Newport vs. James Taylor*, decided June 1831, and reported 6 J. J. Marshall, 136, is decisive of the question now presented. The whole question presented in that case, was the right of the Trustees of Newport to a grant of a ferry from the strip of ground between the town and the river, called the "Esplanade." No question of the right to wharfage; no question of the equitable right of the town to the use and benefit of the ferry run by Taylor, could have been decided in that case so as to bind the parties. These questions were not made or decided. That was an appeal from the county court, which had no equitable jurisdiction. It was a legal question under the statute, an *ex parte* proceeding, *quasi in rem*, operating as constructive notice to all persons who claimed the lands. (5 Dana, 102.) And there were but two questions to be inquired of by the court, on the application of the trustees of Newport for the grant of ferry privileges. 1. Is the proposed ferry necessary for the wants of the public? 2. Is the applicant for the grant the holder of the legal title to the land, from which the ferry is proposed to be established? It may appear that the court took a wider range in the discussion of these questions, than was

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necessary to their decision. So in the case of *The City of Newport vs. Taylor*, 10 B. Monroe, 361, decided in 1850. But it is believed that the questions now presented were not then before the court. The questions then adjudicated were purely of a legal character, whether Taylor or the trustees had the legal title to the land; if Taylor had it the trustees could not have the ferry. The record in the first case was imperfect, and the court had not all the facts connected with the establishment of the town. The parties seem to have gone no further back than the act of 1795, and upon such state of facts the court decided; but that act refers back and confirms what had been previously done, which, when shown, throws light upon the questions now presented. With all due respect to that court we think it erred.

4. The fourth and last point, is the right to navigate the Ohio between Newport, in the state of Kentucky, and Cincinnati, in the state of Ohio, and to engage in the trade and commerce between those points, under a license from the authorities of the United States of America, to carry on the coasting trade.

The plaintiffs claim an *exclusive* privilege to transport persons and property over the Ohio river from Newport to Cincinnati, under the laws of Kentucky; and the defendants, the owners of the steamer Commodore, claiming to act under the authority of the United States, deny that *exclusive* right or monopoly in the plaintiffs.

Upon what do the plaintiffs base their claim? The deed of 1799, conveying the remainder of the tract of 1500 acres of land, upon which Newport is situated, does not convey any land in Newport. The boundary given expressly excludes Newport. All that the deed purports to pass is "all right and title which the said James Taylor, the elder, now has, or is entitled to, in and to any ferries from the said town of Newport," &c. The legal title to the "Esplanade," was not conveyed by the proprietor to those

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under whom plaintiffs claim, it descended to the heirs, and the record does not show who are the heirs. Nor can it be said that the attempted conveyance of the ferry passed the legal title by implication, because the deed is very specific, and yet does not convey the title. Secondly; because there was no general law at the date of the grant by the Mason county court, (29th January, 1794,) authorizing the county courts to grant ferries in any case, and that court had no jurisdiction, and therefore the grant was void. (2 *J. J. Marshall*, 226.) The first act giving the county court such power, was in 1796, and went into operation 1st March, 1797; (*Stat. Law*, vol. 1, 706,) and that act did not apply to the Ohio river. The first act giving power to county courts to grant ferries on the Ohio, passed Dec. 22, 1806. (*Stat. Law*, 709.) J. Taylor's grant in 1794 was a nullity. A ferry privilege is not the subject of a positive grant from one person to another. The granting or withholding the privilege of a ferry is at the disposal of the government, and cannot be demanded as a matter of right, even by the owner of the soil; (6 *J. J. Marshall*, 143,) nor can one having the right grant it to another. (3 *J. J. Marshall*, 669.) There could be no grant of the "Esplanade," as it had been dedicated, and with the knowledge of James Taylor, and by it he was bound. By the dedication, the proprietor lost all control whatever over the ground, except to hold the legal title as trustee for the beneficiaries; he could make no conveyance to their prejudice.

2. The plaintiffs show no actual grant of a ferry right to themselves. The record shows an order of the Campbell county court of 1848, directing the heirs of Gen. James Taylor, by name, and the husbands of the females to enter into bonds under the ferry law. If that order is equivalent to the grant of a ferry, then said heirs are necessary parties to this suit; if that order is not the grant of a ferry, then there is no ferry privilege. Taylor shows no grant of a ferry to him as executor.

There is no devise in the will of Gen. Jas. Taylor, of the "Esplanade," to the plaintiffs, or either of them. James Taylor is only a trustee to rent out the ferry. The will shows certain remainder men that are necessary parties to a suit to settle the rights therein. The decree injoining the running of the Commodore, is erroneous for a want of parties.

The owners of the Commodore contend that the Ohio river is a great national highway, that it is an "inland sea," and the commerce and navigation thereof subject to the laws of the United States; that by section 8, subdivision 3, of the constitution of the United States, Congress has power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes; and by subdivision eighteen, Congress has power "to make all laws which shall be necessary and proper to carry into execution the foregoing powers," &c. The supreme court of the United States declares that the power to regulate commerce extends to every species of commercial intercourse between the United States and foreign nations, and among the several states, and includes the power to regulate navigation. (*Gibbons vs. Ogden*, 9 *Wheat.*, 1 to 216.) The only exceptions stated by the court, relate to state inspection laws—laws for regulating the *internal commerce* of the states—and those with respect to turnpike roads, ferries, &c. The exception of ferries, is claimed to apply to ferries on the Ohio river; this is not admitted. The court speaks of the internal commerce of a state alone, placing ferries in the same category with turnpike roads. We grant that ferries wholly within a state, where both banks of the stream are within the state, may be within the exception, and the ferry wholly regulated by the state, but the Ohio lies between two states, and the commerce thereon is regulated by Congress, and that Kentucky has no right to establish an exclusive monopoly of the navigation of the Ohio from the Kentucky shore, for a certain distance up and down the river. The free

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navigation of the Ohio was declared before Kentucky was a state. By the ordinance of the 3d July, 1787, for the government of the territory of the United States north-west of the Ohio river, it is expressly declared, that the "navigable waters leading into the Mississippi and the St. Lawrence rivers, and the carrying places between the same, shall be *common highways*, and forever free, as well to the inhabitants of said territory as to the citizens of the United States, and those of any other state that may be admitted into the confederacy, without any tax imposed, or duty therefor." By the compact with Virginia, sec. 11, "The use and navigation of the river Ohio, shall be free and common to the citizens of the United States, and the respective jurisdictions of this commonwealth, (Virginia and the proposed state of Kentucky,) on the river as aforesaid, shall be concurrent only with the states which may possess the opposite shores of said river." This compact was adopted by the old constitution of Kentucky, article 6, section 9, also by the present constitution, art. 8, sec. 9.

In the case of *Arnold & Parent vs. Shields*, 5 Dana, 22, this court used the following language, in reference to the compact with Virginia: "Jurisdiction, unqualified being, as it is, the sovereign authority to make, decide on, and execute laws, a concurrence of jurisdiction, therefore, must entitle Indiana to as much power—legislative, judicial, and executive—as that possessed by Kentucky, over so much of the Ohio river as flows between them; and consequently neither of them can, consistently with the compact, exercise any authority over their common river, so as to *destroy*, or *impair*, or *obstruct* the concurrent rights of the other."

The commerce between Ohio and Kentucky, at the point between Newport and Cincinnati, is shown to be very great, and the "Esplanade" on one side, and a corresponding point on the Ohio side, a common place of landing for all boats and water crafts, and

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roads made thereon from various points of the "Esplanade."

It appears that the Commodore is a regularly equipped, inspected, enrolled and licensed steamboat under the laws of the United States, manned by licensed officers; and that she is engaged in the commerce and carrying trade on the Ohio river, between the states of Kentucky and Ohio, and to and from the public landing at Newport.

Of what avail is a license from the United States to run a boat, and engage in the commerce between the states, or among the states, if it is not a sufficient authority to run a boat, and carry freight and passengers, and it be subject to be defeated by a monopoly, granted by a state bordering on the river, to one or more persons, and allowing them the exclusive use of this trade? The United States may be, in this way, defeated in the exercise of its constitutional powers.

The supreme court said, (5 *Howard*, 465,) "the act of July 7th, 1838, in all its provisions is obligatory upon the owners and masters of the steamers navigating the waters of the United States, whether navigating on waters *within* a state, or between states, or waters running from one state into another, or on the coast of the United States, between the ports of the same or different states." In a later case, speaking of the jurisdiction of the United States government over the navigable waters of the west, the supreme court of the United States said: "That equality does not exist if the commerce on the lakes, and on the navigable waters of the west, are deprived of the benefit of the same courts, and the same jurisdiction for its protection, which the constitution secures to the states bordering on the Atlantic." (12 *Howard*, 454.)

"The act of congress of the 26th February, 1845, (5 *Stat. at large*, 726,) extending the jurisdiction of the district courts to certain cases upon the lakes, and

navigable waters connecting the same, is consistent with the constitution of the United States."

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"The admiralty and maritime jurisdiction granted to the federal government by the constitution of the United States, is not limited to *tide waters*, but extends to *all public navigable lakes and rivers*, where commerce is carried on between different states, or with a foreign nation." (12 Howard, 443.)

In the case of *Fretz, &c. vs Bull, &c.*, (12 Howard, 466,) the extent of the admiralty and maritime jurisdiction of the United States is again affirmed. In another case, (7 Howard, 401,) the court said: "Commerce includes an exchange of commodities, navigation and intercourse." "That the transportation of passengers is a part of the commerce, is not an open question."

Again: *State of Pennsylvania, &c. vs. Wheeling Bridge Co.*, (13 Howard, 519;) "The Ohio is a navigable stream, subject to the commercial power of congress." "Congress has sanctioned the compact made between Virginia and Kentucky, to-wit, that the use and navigation of the river Ohio, so far as the territory of Virginia or Kentucky is concerned, shall be free and common to the citizens of the United States. This compact is obligatory, and can be carried out by this court." (*Ib.*)

The plaintiffs claim the exclusive right to transport passengers, &c., from the Kentucky shore, including the whole front of the city of Newport, a distance of more than one mile, to the Ohio shore, and we suppose they also claim the prohibited distance above and below the ferry ground, as established by law. The decree of the circuit court fairly recognizes their right to transport persons and property from the slip of ground called the "Esplanade;" and goes farther, and prohibits the defendants, and all others claiming under them, from transporting on the Commodore, or any other vessel, any person or thing, from the Ohio shore, and landing on the said "Esplanade" in Newport, and declares that transportation from the Ohio shore, and landing on said

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ground, will be deemed a violation of the ferry franchise of the plaintiffs.

We think the court misconceived the extent of the plaintiffs' ferry franchise. They do not claim that the grant gives them an exclusive right both from the Kentucky to the Ohio shore, and from the Ohio to the Kentucky shore. The injunction is broader than the claim of the plaintiffs; moreover, if they had claimed that their grant was thus extensive, there is no right shown to sustain such claim. Kentucky cannot grant an exclusive privilege to transport persons and property from Ohio to Kentucky, across the Ohio river.

If the object of plaintiffs be their own personal emolument, and not in good faith to carry out a trust duty, their claim is entitled to but little favor from the chancellor.

The attention of the court is called to the following points:

1. The commerce upon the Ohio has been long regulated by congress. (13 *Howard*, 561.)
2. The Virginia compact has become the law of the United States. (*Ib.*, 556.)
3. No state can obstruct the free use of a license granted by an act of congress. (*Ib.*, 556 to 579-80.)
4. The act of congress gives to vessels licensed and enrolled, the right to navigate the public waters, and any state law conflicting with that right is void. The right extends to entering creeks and rivers. (*Ib.*, 586.)
5. A dedication of ground to public use, cannot be defeated, even by the building a custom house thereon, (10 *Peters*, 716,) nor can such be defeated even by king or government.

Henry Stansberry on the same side—

The decree, from which this appeal is taken, was rendered as of the June term, 1854, of Campbell circuit court, and is, in substance, as follows:

1. Defendants (other than corporation of city) per-

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petually enjoined from landing Commodore, or any other boat, at the Esplanade, for the purpose of landing, or receiving persons or property ferried *from* or *to* the opposite shore.

2. That as to all the defendants, it is adjudged that the entire privilege and franchise of ferrying persons and property to and from said Esplanade, is in the plaintiffs alone.

3. That *the receiving* persons or property on any boat, at the Esplanade, to be transported *to* the opposite shore, and the landing of persons and property at said Esplanade, *from* any boat, *from* the opposite shore, is an infringement of the ferry license of plaintiffs, and is perpetually enjoined against the defendants, and all persons claiming under them.

4. Account directed as to monies received by defendants for such transportation *to* and *from* the Esplanade.

5. Plaintiffs' claim for wharfage dismissed.

6. Counter claim of city for profits of ferry, and for legal title to Esplanade, and of other defendants for damages, dismissed.

We claim that the decree is erroneous, and make the following points:

1. That there is a defect of jurisdiction.

2. That there is a defect of parties.

3. That the ferry right, if one exists, is confined in extent to *one* landing, which is at the foot of York street. and to the transportation of persons and property only *one way*—that is, *from* Newport *to* Cincinnati—in both which particulars the decree is erroneous and excessive.

4. That the only colorable right which can be set up by the plaintiffs to any part of the Esplanade, or public landing, at Newport, is confined to so much of it as is incident to, and is necessary for, the ferry—that is, so much of it as may be required for a convenient place of landing—and that all the residue of the Esplanade has been well dedicated to public use.

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5. That as to the right to a place of landing, as incident to the ferry, that right only exists as a *legal* right, in virtue of the grant of the ferry franchise, which right in fact belonged to Newport in 1794, when it was first granted to James Taylor, of Virginia, and has since been continued in the original grantee and his grantees, contrary to equity, and ought not to be enforced by equitable relief.

6. That the right set up by the defendants to use the public landing at Newport, in the navigation across the Ohio river, under a coasting license from the United States, cannot be defeated by any exclusive grant set up by the plaintiffs under the laws of Kentucky.

Defect of jurisdiction.

The right set up is to an exclusive ferry grant from Newport across the Ohio, and the relief sought is by perpetual injunction, and by a decree quieting the title forever.

The case is not of such a character as to authorize such extraordinary relief. A ferry in Kentucky has always been a franchise, grantable by the commonwealth, to an individual, for the public benefit. There is no such thing as a right at common law, in Kentucky, to a ferry, as an incident to the ownership of the land. The grant is a trust, revocable at the pleasure of the state. There is no such thing as a vested right or estate in the franchise; it may be wholly destroyed by the grant of a bridge, or another ferry, at the same place; the grant is only exclusive so long as it is made so by statute. The statutes which create this franchise provide a remedy, and a very ample one, for every infringement. The rule is, that where a right is created by statute, and at the same time a remedy is given for its protection, resort cannot be had to any other remedy than the one so given. (*Almy vs. Harris*, 5 *Johns. Law Rep.*, 175.)

Defect of Parties.

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The plaintiffs are James Taylor, as executor of James Taylor, sr , and Robert Air.

The right set up is to a *ferry* across the Ohio river from Newport, and to the entire *Esplanade* of Newport, as a landing. It is claimed that both rights are *exclusive*, and extraordinary relief is asked, in respect to both, by injunction, to be made perpetual by a decree settling the title, and an account of ferry fees and wharfage.

These are the rights set up by the plaintiffs.

Both these rights are claimed by the plaintiffs under James Taylor, sr.,—by James Taylor, jr., as his executor, under the provisions of the will, and by the plaintiff Air, as lessee of the executor.

The ferry.

It is claimed that the testator was the owner of the fee in front of Newport, and that, as such, held a ferry grant from the county court at the time of his death; that the testator died in 1848, and by his will directs his executor to rent his ferries during the executor's life, and after the death of the executor, the ferries, with the Esplanade, are devised to the testator's four children for life, and then to their children.

It is further alledged, that after testator's death, at December term, 1848, of Campbell county court, and during a contest of the will, the ferry privilege was granted by the court to the four children of testator and the husbands of the three daughters, who gave bond, but never took possession. Air was then in possession under a lease from testator.

That on 1st April, 1853, Taylor, as executor, made a new lease to Air for six years.

That Taylor's executor, and Air, have each given ferry bonds, and Air is now in possession.

The will of Taylor is made an exhibit.

The provisions of the will touching the ferry are found in sections 16 and 17. It appears that a distinction is made in the will between the *rents* of the ferry, and the *ferry* and the *Esplanade*—for the rents

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are devised to the children on one contingency, that is, the death of the widow, and the ferry and Eaplanade are devised to them on another contingency—the death of James.

There is a meaning in this distinction, for the ferry ownership may be in one, and the right to receive the rents in another. So the grant or franchise of the ferry may be in one, and the ownership of the land in another. This would happen upon a recovery in ejectment, or sale on execution, of the land at a ferry, after *the grant*. The franchise would not pass upon such recovery or sale, but would remain in the original grantee.

We find, then, by the terms of this will, that so far as the executor is concerned, the only devise to him, as such, is a power to *rent* the ferry, and to receive the rents during the life of the widow, and to satisfy out of them the charge of \$1,200 per year, and to accumulate the residue for distribution among the children after the death of the widow.

In view of the Kentucky decisions, and the statutory provisions on the subject of ferries, the following rules may be laid down :

1. That by statute, not at common law, the right to have a ferry grant on the Ohio river, is in the owner of the land.

2. Before the grant is made, this proprietary right passes by descent, or sale, as an incident to the land.

3. The grant, though made originally to the owner of the land, is in the nature of a personal trust. (5 *Monroe*, 140.) It does not pass to the plaintiff, after a recovery in ejectment of the *locus in quo*. (*Littell's Select Cases*, 184.) Nor, on sale of the land on execution. On a sale of the ferry grant by the owner, or on a lease of same for a term of years, or on a devise of the ferry grant, or in case of descent, the franchise does not pass, except by leave of court, and new bonds, amounting, in effect, to a renewal of the grant.

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On the death of Taylor, there being no devise, either of the fee or of the ferry grant, to the executor, the grant, or rather the right to renew it, passed to the children, either as heirs or devisees.

It is averred in the petition that the ferry grant was made to the children, and that they gave bond.

This *invested* them with the grant, and they stand as the actual owners of the ferry, notwithstanding they have not taken possession.

Subsequent thereto, it appears that at March and April terms, 1853, the executor gave a ferry bond (!), and Air also, the executor having leased to him for six years from April 1, 1853.

Although the grant was to the heirs, the executor (perhaps) might *lease* the ferry, with leave of the court.

We have, then, only the *executor* with a bare *power* to lease and receive the rents; and the *lessee* for *six years*. The owners of the ferry grant, as well as of the fee, not in the record. This is fatal.

All parties in interest must be made parties, by the *Code* as well as before.

Here the question is as to the very right, the grant, its validity, an interference which, it is said, will *destroy* it, a claim to settle it forever, and yet the owners not parties!

The Esplanade—defect of parties.

The bill alledges—

That the *legal* title was never granted to the town, but it was laid out for a common, reserving grantor's rights therein, and has been occupied by him and his grantees, adversely, for sixty years.

That it passed by deed, in 1799, to J. Taylor, the son of proprietor.

That he owned it at his death.

That since his death it has been held by the executor! and the lessee!

That trustees have leased part of it, at foot of Monmouth street, to the other defendants, who are running a ferry thereto, to the *total destruction* of one

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 vs. ferry franchise, and of Air's lease.
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Landing at Monmouth street is included in lease.

One square from Air's landing!

Prayer.

1. Account for use of landing.
2. For ferry receipts.
3. Injunction from running.
4. That lease be cancelled.
5. That rights of plaintiffs to landing, and ferry franchise, be quieted.

This bill traces the legal title to the testator, but no further.

The will does not vest it in executor, but under the term *esplanade* it is devised to the four children for life, and remainder to their children.

As this litigation touches it, and an antagonist claim, the *tenants* for life, at least, must be parties.

But in point of fact, if the legal title or fee in the *esplanade* did not pass out of Taylor, of Va., to the town or the trustees, then it is now in his heirs. It was not included in his deed to his son, Gen'l Taylor, of Newport, made in 1799. See that deed.

Extent of the Ferry.

The plaintiffs' claim is to an exclusive right not only to a ferry, with one landing at York street, but as incident thereto to the *entire Esplanade*, and *all* the landings, including the improved landings at all the streets; and the decree sanctions this claim in its fullest extent.

We maintain—

1. That if there is a ferry right in the plaintiffs, either by grant or reservation, it is limited as to the privilege of *landing*, to *one* place, and that place is the mouth of York street.

2. That this right or franchise, is limited to the right of carrying persons and property *from* the Kentucky shore *to* the opposite shore, and does not include the right or franchise of transporting persons or property *from* the opposite shore *to* the Kentucky side.

1. As to the landing—

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It is of the essence of a ferry that it should have two landings—one on each side of the stream, or water—and only one on each side, which must be well defined. The idea of a ferry without a fixed, defined place of landing; of a ferry with a multiplicity of landings, extending indefinitely along a river coast or shore, is wholly inconsistent with public convenience, and with positive regulations.

It must be *located* either by the grant, or by user under the grant. There must be a notorious place where *the public* are to embark, or to land, without the inconvenience of following it, or being transported by it along an indefinite coast, or at various points within a definite limit, and such landing must be kept *in repair*. (*Stat. 362, sec. 22.*) Besides this, there must be a defined landing; a fixed point, to comply with the statutory regulations.

(1.) That the point must be fixed in order to measure the prohibited distance for another ferry, in a straight line, one and a half miles on the Ohio, or four hundred yards, at a town.

(2.) In order to ascertain the distance in view of statutory penalties.

The *landing* of Taylor's ferry is at the north of York street, and no other landing can be adopted except from temporary necessity, as in case of low water. Taylor's right in the Esplanade, is therefore limited to a ferry landing, at that point.

The original grant in 1794—"from his lands on the Ohio, over the same, in front of the town of Newport."

The grant in 1807—"in front of Newport, across the Ohio to the opposite shore."

Neither of these orders fixes the landing, any further than it is to be established in front of Newport. We must therefore look for the *location* as established, or *used* under the grant. The evidence is abundant, that for the last twenty-five or thirty years, York street has been the landing; occasion-

ally interrupted by extreme low water, when the landing was at a *bar* about one hundred yards from the shore, and above the original front of Newport.

Besides this, Taylor has repeatedly defined and limited his *landing* to one point, which was the foot of York street.

(1.) Lease to Geo. W. Doxon, in 1835, of the ferry "from his (Taylor's) landing."

Doxon to run a steam ferry boat from "the landing in front of Newport."

If a new ferry is ordered by court, above or below the *present landing*, Doxon to provide boats for it.

If court give another ferry at Newport to any one else—rent to be abated.

Doxon to keep the *landing* of the ferry, or ferries, in good repair.

Similar provisions in lease of 1838.

In addition to all this, the exclusive right of the town to all the residue of the Esplanade, and to all the other landings at the foot of the other streets, is clear.

1. By the original dedication, the only reservation pretended, is to a ferry privilege, and that must be construed to extend only to *one* landing, as only one is necessary or proper.

2. By continued possession by the town, and acts of ownership.

Order by trustees for running streets to river in 1796.

Market-house 1812.

Improvement of landings since 1820, and *expenditures*.

Charge of wharfage in 1840.

3. Ferry only *from* Newport.

Kentucky has never assumed to grant a ferry *from* Ohio, and has not ever granted a ferry across the Ohio, except for transportation *from* Kentucky.

All the grants to Taylor, have expressly been for a ferry across the Ohio *from* Newport. *That* is the

limit of his franchise, and nothing further could have been granted to him, under the ferry law.

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As he never had the right to have a ferry from the Ohio side, or to transport for hire persons or property *from* Ohio, no exercise of that right by others can be considered an infringement of his franchise, or be held in any possible way to interfere with his rights, or diminish his profits.

It is a rule as to *franchises*, that they are to be strictly construed, being exclusive of public rights, and that nothing passes as incident to them, by implication.

It would seem that a penalty is provided in the 14th section of the ferry act, in favor of the owner of a ferry even on the Ohio river, against any one, other than the owner of a ferry on the Ohio side, for transporting any person or thing *from* Ohio to Kentucky, within one mile of the Kentucky ferry, for hire.

So far as this section applies to transportation across the Ohio *from* Kentucky, there is reason for the provision, and for the penalty given to the Kentucky ferry; but so far as it applies to transportation *from* Ohio, it is impossible to imagine a reason for it, or why damages so severe should be given to the owner of the Kentucky ferry, for an act which does not interfere with his rights, or diminish his profits. A reasonable construction would probably hold, that notwithstanding *the letter* of the section, the penalty was not intended to cover such an act, and that the *penalty* should be restricted to the *right*, or rather to an invasion of the right. But if not; if the letter should be too clear; if the penalty must be enforced, then we say the remedy must be confined to *the penalty*, and that it would be monstrous injustice to extend the section beyond the statute, *in equity*, by injunction or otherwise.

It will be seen that the decree perpetually enjoins the defendants from landing any person or thing at any part of the esplanade, which has been trans-

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ported *from* the opposite shore, and such transportation and landing of persons or things, is declared to be an invasion of the ferry franchise granted by Kentucky to the plaintiffs. Surely it is not necessary to argue this point further. The error of the decree is too manifest.

4 and 5. These points may be considered together; they affirm that the whole esplanade, or the open ground now called the esplanade, was well dedicated to public use, without any reservation; that the only colorable right which can be set up to any part of it by the plaintiffs, is confined to what is *necessary* to the ferry—that is, a reasonable landing place—which restricted right is a mere *legal* right, wrongfully obtained in 1794, and since maintained contrary to equity, and therefore not to be enforced by equitable relief.

It is impossible, within the limits of an ordinary brief, to state all the facts and grounds upon which we rely to support the above positions. All we can do, is to give a general outline of them.

We say the entire river front, without any reservation, was dedicated to public use, by the laying out of the town, and the sale of lots it 1792, 1793, and 1794.

The town is a *river* town. It is described in the original plat as situated at *the confluence* of the Ohio and Licking rivers. Along the Ohio river in front of the river tier of lots, and between them and the river, was a narrow, irregular, margin of river bank. On the original plat appeared a line—either continuous or broken—traversing this margin, parallel to the river tier of lots, and about sixty feet distant from them. Between this line and the river nothing was written—no number, no subdivision—not a word to indicate private property, ferry right, or any other reservation. It was left to speak for itself, and we think it spoke a very plain language. “This narrow strip of river shore is most convenient and necessary for the use of this town, it is better, therefore, to leave it open and public, for the use of the town and the public gen-

erally, than to sell it to individuals, or to reserve it for the use of the proprietor."

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Res ipsa loquitur.

Now at the time of this dedication there was no such thing as a ferry right incident to the ownership of lands situate on the Ohio river, and no ferry had then been granted to Taylor or any one else from this shore. There was no right of ferry either *in posse* or *in esse*, and therefore no foundation to *presume* the *reservation* of such a right.

Next in order was the re-survey and new plat made in 1795. On this new plat the *line* is abolished, the entire front is left open, and upon it, as a unit, is written, "the Esplanade to remain common forever." This is a very emphatic declaration of the intention as to this front, from the beginning—that it was all common ground—that the original line which traversed it longitudinally, meant nothing, and was therefore omitted on this new plat, and that the whole open space was to *remain* public ground forever.

After this comes the act of the general assembly of December, 1795.

The court will at once see, upon looking into this act, that it does not profess to interfere with any rights. It gives no new rights, it vests no new estate. It simply excepts from the grant to the trustees, whatever had not been *disposed* of. It is in the nature of a *saving*, and applies to the past.

If Taylor had not dedicated this ground to the public, then the act saves it to him, just because it had not been disposed of; or if Taylor had specially reserved the ferry right, then, too, the act would save it for him, but not otherwise. To make this act operative as a saving to Taylor, it must appear that the particular thing sought to be brought within it, had not been *disposed* of.

I admit that the case in 6 *J. J. Marshall*, and the one which followed it in 11 *B. Monroe*, proceed upon the ground that the ferry right was well reserved to Taylor; but those decisions cannot apply to the facts

fact, and omissions of fact, which entirely destroy their weight in this case.

One important error is, that a ferry had been granted to Taylor, *prior* to the establishment of the town. Whereas, the town was established in 1792, and the first ferry was granted in 1794.

Another error is, in supposing that the deed of 1799 specifically conveyed the land, or Esplanade, as well as the ferry.

The idea that these decisions, made in a summary proceeding, contrary to the course of the common law, settle forever the *question of title* in the *locus in quo*, that they bar an inquiry into title in subsequent litigation, and have even a greater effect than a recovery in an ejectment; this idea is certainly erroneous. They settle nothing but the *legal right* to keep the ferry, and that is shown by the *grant* of the county court, which cannot be impeached collaterally. But such a grant does not conclude as in this case—a case in which not merely the *grant* is relied on—but a title antecedent to the grant, in which the plaintiffs do not appear simply as ferrymen, but as owners of the fee, and in which they ask to be confirmed, not merely in the grant, or in the exercise of the franchise—but also in the pre-existing right, not merely in the temporary license, but in the permanent property.

As to the alleged long possession, and to the aid of the statute of limitation, these do not help the case.

The entire possession has been incident *to the ferry*. It is not in any sense an *adverse* possession. The plaintiffs entered and have enjoyed in virtue of a license from the public, and can therefore assert no rights as acquired by such possession.

6. The remaining point is one of great consequence, but we are compelled, for want of time, to confine ourselves to a statement of the grounds on which we rely, and a citation of authorities.

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1. Our steamboat, being of a tonnage of more than 100 tons, engaged in the transportation of persons and property from Ohio to Kentucky, across the Ohio river, was engaged in commerce between the states.

2. As such boat, engaged in such commerce, and having complied with the laws of the United States, by taking out a coasting license, she was *authorized* to land at the public landing of Newport.

3. No state, under its ferry laws, or any other police authority, can *perpetually exclude* the landing of a vessel carrying on commerce between the states, and having a license from the United States.

4. The exclusion in this case, against bringing persons or freight *from* Ohio, and delivering persons and freight at a public landing in Kentucky, is in no sense a *ferry* regulation of Kentucky, for Kentucky never has attempted to grant or regulate a ferry *from* Ohio.

5. We admit that certain police regulations, which affect commerce among the states, may be established by each state for itself, such as quarantine, pilot, and wharf regulations, but these cannot extend so far as to authorize *exclusive* grants or monopolies, or to prohibit altogether and under all circumstances, the landing of a vessel engaged in such commerce. (See *Gibbons vs. Ogden*, 9 *Wheat.*, 1; 7 *Howard*, 400, 430, 473; 12 *Howard*. 455.) "Vessels engaged in the coasting trade on the sea coast or on a navigable river, including ferry boats, as well as all other vessels, must be enrolled and licensed." (*Benedict's Admiralty*, 123; *Ib.* 114, 115.)

J. W. Stevenson for appellees—

The questions presented in this record are not difficult or numerous. They are, however, interesting and important. Upon the part of the appellees it is maintained:

1. That the strip of ground in front of the town of Newport, never was public property. That no dedication of it was made, by the plat of 1792, or that

of 1795; and that the legal title thereto, was never divested out of the patentee, or those claiming under him, by either of said plats, or in any other mode.

2. That by the act of the legislature of Kentucky, approved 14th of December, 1795, incorporating the town of Newport, all rights, advantages, and privileges in and to said strip of ground, not inconsistent with a right of common on the part of the inhabitants of Newport to said ground, were, by the express terms of said act, secured and reserved to Jas. Taylor, and among such rights, were the exclusive ferry franchise, wharfage, &c.

3. That this court having twice adjudicated upon said act of 1795, between the town and city of Newport, and said James Taylor, and such judicial construction of said act and the respective rights of said parties, thereunder, as to this slip of ground, and the exclusive ferry franchise therefrom; the attempted claim on the part of the defendants, to a ferry, is now *res adjudicata*,—said decisions being a bar upon the city of Newport, and all claiming under them.

4. That the continued adverse uninterrupted use by James Taylor, of said slip of ground, and the running of the ferry therefrom for fifty-six years, and the acquiescence of said town and city, in such use and possession, by Taylor and those claiming under him, with full knowledge of his claim, would have freed said strip of ground from its supposed dedication to public use, in 1792, if any had existed, and become re-invested in Taylor, as private property.

5. That the statutes of Kentucky, regulating ferries, and requiring grantees of such franchises to be the owners of the soil, when granted, on the Ohio river, are not regulations of commerce, but a legitimate exercise of state sovereignty, wholly within the territory of the commonwealth of Kentucky, never surrendered to the general government, not inconsistent with the statute of the federal government, and are in all respects, constitutional and valid.

6. That the statutes of Kentucky, regulating ferries within the commonwealth of Kentucky, on the Ohio river, are internal police regulations, not restrictive of, or inconsistent with, the right of a free navigation of the Ohio river, as secured under the compact between Virginia and Kentucky, and in no way interferes with the intercourse between the states of the confederacy.

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7. That the license set up by the defendants, under the authority of the United States, as an enrolled vessel, employed in the coasting trade, under the act of Congress, confers no authority upon them, to establish a ferry on the land of Taylor, wholly within the commonwealth of Kentucky, against his consent, and without grant from the proper legal authority in this state; and that any such attempted construction of said statute, is a palpable perversion of its true meaning and object, and would be unconstitutional and void.

I. The first question presented, is: was there an express or implied dedication of the slip of ground in front of the town of Newport, by the laying out of that town, by the plat of 1792?

A careful examination of the bill, exhibits, and answers, in this cause, will abundantly show, that no such dedication was either expressly or impliedly made, and none contemplated.

There is not a particle of proof in this record, going to show that there was any express dedication of this slip, in 1792. There is no endorsement on the plat evidencing such a dedication, and no parol proof has been offered, going to show such intention upon the part of the patentee, James Taylor, of Virginia, or his attorney in fact, Hubbard Taylor, who was the sole agent employed in laying out the town, in 1792. It is to be remarked, that the plat of 1792, did not include this strip of ground, nor was any part of this slip of ground now in controversy, either surveyed or included in the plat of the town, made by Hubbard Taylor, in 1792. No part of it was laid off

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into streets, or lots. The streets, as laid down on said plat, in 1792, terminated at Front street. There is nothing in the conditions attached to said plat, and no endorsement thereon, expressive of the slightest intention that the ground between the northern boundary of Front street and the Ohio river, was intended by the proprietor or his agent, as public ground, or for the public use. The northern boundary of Front street was the northern limit of the town, as platted and laid out by Hubbard Taylor, in 1792. The answer of the city of Newport in this case admits that no streets were laid out beyond Front street. The evidence of Hubbard Taylor shows, that no ground north of Front street was surveyed or included in said town, as laid out by him on the plat thereof exhibited in 1792. The plat itself exhibits a continuous, unbroken black line on the north line of Front street, as the northern boundary of the town, and evidences not the remotest indication that the ground between Front street and the Ohio river, was dedicated, or intended for public use.

There is no proof of any parol dedication of the ground in controversy, at the period of the location of this town, in 1792. The testimony of not a solitary witness is offered, going to uphold such a dedication. Hubbard Taylor, the agent for his father, says, "that he avoided and refused to lay off any part of the ground between Front street and the Ohio river, either into streets or lots; nor did he lay off any of the streets running towards the river, beyond Front street, in order that all the ground between Front and the river might be reserved to said Taylor, and also to enable him to hold the exclusive right to the ferry across the Ohio river, in front of said town. He states that his agency for his father, James Taylor, of Virginia, ceased in 1793, and no street was ever laid out by him, to the Ohio river."

This statement is wholly and entirely inconsistent with any verbal dedication of the slip in question,

by him, and would have been destructive of the great object which he states it was his intention to perpetuate, viz: a retention of this slip by his father, for purposes in his deposition set out. If, then, there was no express written dedication of this slip, and no parol dedication, nothing on the plat evidencing an intention on the part of the proprietor or his agent, to give this slip to the public, in 1792; some act must then have been done by said agent in the laying out of said town, from which an implied dedication will result to the public, of this ground in controversy. Does this record furnish the evidence of any such act.

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Let it be remembered, that James Taylor, of Virginia, was the patentee of the ground in controversy, and entered into the possession of it many years prior to the year 1792. If it is to be taken from him, or those claiming under him, it must be by some clear, unequivocal, well defined act of his, proving a dedication, or wholly and directly inconsistent with the retention of this ground, after the performance of such act. A dedication to be implied, must be under circumstances which clearly indicate an abandonment by the patentee, of the use of this slip, exclusively to the public. (4 *Camp*, N. P., 16; 11 *East*, 370; 3 *D. & E.* 265; *Jarvis vs. Dean*, 3 *Bingh.*, 447; 22 *Pick.*, 75.) There must be no declarations of the owner, of any reservation, or any other declaration inconsistent with his clear assent to such dedication. (*Levett vs. Wilson*, 3 *Bingh.*, 116; 7 *Leigh. Va. R.*, 546.) The idea of a dedication to the public, of a use of land for a road, (and *a fortiori* for a public wharf,) must rest on the clear assent of the owner, in some way, to such dedication. (8 *Adolphus & Ellis*, 99; 1 *Hill*, 191; 19 *Wendell*, 128; 6 *Peters*, 431; *Sargent vs. Ballard*, 9 *Pick.*, 256; 3 *Kent's Com.*, 445; 1 *Camp*, N. P., 262; 9 *How. S. C. R.*, 30.)

Now what is the act from which the assent of James Taylor, of Virginia, to a dedication of this ground, is to be inferred?

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If I correctly comprehend the argument on this point, of the learned counsel opposed to me, it is, that as the town of Newport was laid out on the river, with a plat showing its location on the river, no reservation on the plat of this ground, between Front street and the Ohio river, the exhibition and sale of lots under this plat, in 1792, that these are acts which afford abundant ground from which a dedication of this slip of ground to the public use, by the consent of the proprietor, is to be implied.

If there were nothing in the record explaining these acts, giving to them their fullest force, there would be great force in this argument. Thus if a man makes a plan of a city on his land, with certain streets and alleys laid down between the lots, and he sells them under this plat, it is presumed that he intends to dedicate such streets and alleys, and he is estopped to deny it. This acknowledged and familiar principle is recognized in a number of adjudged cases of high authority. (7 *How. U. S.*, 196; 6 *Pet.*, 106; 10 *Pet.*, 718; 4 *Paige*. 510.)

So too, in this court, it has been held that a location on the river, is sufficient evidence that the town so located extends to the water. (*Trustees of Maysville vs. Boone*, 2 *J. J. M.*, 224; *Giltner vs. Trustees of Carrollton*, 7 *B. M.*, 680;) and in the *City of Louisville vs. Bank of U. States*, 3 *Ben. Mon.*, 144, it was so held, even though there was an unbroken black line in the plan of the town, on the side of Water street next to the river, and that the intervening space was not divided into lots or squares.

But the evidence in this record does not render this principle applicable. Undoubted law, in this State, we admit it to be, whenever a state of fact is disclosed which authorizes its application. In the cases referred to, and others of a similar character which might be cited, especially in *Rowan's Executor vs. the town of Portland*, 8 *Ben. Monroe*, 232, the question was, whether upon the face of the map a plan of the several towns cited in the various cases,

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located upon a large navigable river, having a strip of ground between the street next to the river and the river, such town was to be regarded as extending to the river, and whether an intervening slip of ground between the streets next to the river and the river, in these towns, were to be regarded as dedicated by the original proprietor to the public use.— Where nothing was said on the plat touching said strip of land, and even where there was an unbroken black line between the street and the river, the court held that said towns were to be considered as extending to the water, and the intervening ground was to be regarded as intended for public use. And why? Because, looking to the map alone, they think it would be almost as reasonable in a proprietor, to sell as private property the river itself, as the ground lining its margin—the occlusion of which, would obstruct the communication between the city and the river. The object of locating the town was, to enjoy the benefit of its facilities as a highway. Looking then, to the map unexplained and alone, they give that construction which will carry out this supposed intention of the founder of said town.

There is nothing however, in any of the cases in Kentucky, (carried, as I think to an extreme length,) which intimates, that if there be evidence to rebut or repel such presumptions, or to show that said town did not include said strip, and was not laid out, surveyed or extended to the river, that still the map, without an endorsement of dedication, would carry them to the same results. Far from it. These cases go only to the point that an unbroken line, and the absence of any words on the intervening slip, are not sufficient to oppose the conclusion, in the absence of other proof, that the intention of the original owner was to dedicate the slip to public use.

In the case at bar, we have not only an unbroken line on the north side of Front street, but we have the evidence of the agent of the proprietor, laying out the town, that the slip in controversy, was not

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only never included in the town or made a part of the plat, but that it never was surveyed, and that this ground was expressly reserved by the proprietor from constituting any part of the town, and the reasons given for such reservation. Is it denied that this reservation was competent? Such a denial assumes the principle, that the owner of the soil could not dispose of his property in his own way, and that he would be incompetent to lay out a town near a river, without extending it against his will, to the water's edge. The statement of such a proposition, carries with it its own refutation. In the very case of *Rowans' Executors vs. the town of Portland*, so much relied on by counsel upon the other side, the court say: "It was entirely within the power, and at the discretion of the proprietor, in the first instance, to determine how much or how little of the intervening space should be left open to the public." (8 *Ben. Monroe*, 246) He had a right to withhold it all, and run the risk of having no lots sold, or to dedicate it, with the prospect of having all the lots sold at an enhanced price. The only points decided in that case, or similar ones by our court, or any other, is, that where the plat is silent on the subject of the dedication of a slip of ground intervening between the lots and the river, that an unbroken black line, together with intervening space, are not sufficient to rebut the presumption arising from the location of the said town on the river, that the proprietor intended said open space for the public use of the lot-holders in said town, in affording them free access to the river.

There is, however, not an intimation in any one of the cases, that these presumptions cannot be repelled by proof; that the slip was reserved as private property, and never included in the town. If this be shown, as we think it has abundantly been, by the testimony of Hubbard Taylor, then the cases cited militate for, not against us. And why? The right of the inhabitants of a town to an easement over a space like this, where it exists at all, rests upon the

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supposed fact, that the original proprietor has been compensated for the surrender of his interest therein, by the increased readiness of sale, and enhanced value imparted to the lots, by the prospective use by the public of this slip, as a means of ingress and egress, and the commercial advantages of a navigable river. This surrender by the proprietor, of his private right in such a slip, to prospective public use, is evidenced by his solemn acts of dedication and grant of easements; or by such acts from which a dedication can be inferred. Where, however, there is evidence to show, that in the first sale of lots, this slip was retained by said proprietor, and was not included in the plan, and was not intended to constitute a part of the town, the purchasers of lots bought with this full knowledge of such retention of the same, as private property; and so far from an enhanced value in the sale of lots, a corresponding depression would have taken place, and no compensation to the owner could have taken place to the proprietor. The reason on which former decisions rested being taken away, their force is destroyed.

I may here be met with the argument, that after a dedication of this slip, and a parting with the title by the proprietor, there could be no such parol reservation, as Hubbard Taylor attempts to prove. If this postulate be granted, the conclusion would be irresistible. The error, however, is in the assumption. We are the owners of the fee, and in the possession of this slip. We deny the dedication of it, and call for the proof. The plat of the town does not extend to the river. There is an unbroken line separating it from the river. The uncontradicted testimony of him who laid out the town in 1792, supports the fact that it never was surveyed, included, and never did constitute a part of the town. But we do not even rest it here. John Bartle was the purchaser of certain lots at the first sale of lots, in 1792.—His lots were on Front street, and if the statement be true in the answer, that Front street was the

northern boundary of the town, he would have been the owner of the ground, and entitled to a ferry.— He applied to the Mason county court for a ferry, in 1703, from his lots in Newport, which was granted him, and in January, 1794, a ferry was granted to James Taylor, who immediately prosecuted a writ of error to the order of the Mason county court, granting John Bartle his ferry, which order was reversed by this court, in 1798, upon the ground that it did not appear that Bartle was the owner of land bounding on the river. The grant to James Taylor, from this disputed slip, was acquiesced in by all the purchasers of lots.

This reversal of Bartle's grant to a ferry, strongly corroborates Hubbard Taylor's testimony as to this slip, when taken in connection with the grant of a ferry to James Taylor, in 1794, and the acquiescence of all purchasers of lots in Newport at that time, of his exclusive right to a ferry. It is almost an irresistible conviction that all the purchasers of lots, in 1792, bought with full knowledge that this slip was not included in the town of Newport, was not intended for public use, but was reserved by the proprietor, in exact accordance with Hubbard Taylor's testimony. If further testimony be required, that this slip did not constitute a part of the original plan of Newport, in 1792, it may be found in the fact, that when a re-survey was had by Roberts, in 1795, the town was enlarged, and extended from Monmouth street to East Row, on the eastern boundary. One hundred and eighty acres was laid off in this enlarged re-survey, in 1795, and that did not include this strip; nor was it surveyed by Roberts, or included in the one hundred and eighty acres designated for the town. (*6 J. J. Marshall*, 139.) If there had been a dedication of this strip, in 1792, and it was then a part of the town of Newport, how can it be rationally accounted for, that when a re-survey became necessary, for an enlargement of the town in 1795, a portion of its former

limits, and so important a portion too, as affording those commercial facilities so strongly dwelt on, should not have been surveyed and included within the boundaries of the town? In addition to all this, the attention of the court is called to the conveyance of James Taylor, of Virginia, to James Taylor, of Kentucky, in 1799, in which this strip is not only conveyed, but the ferry franchise is particularly designated; a fact wholly inconsistent with a dedication of it in 1792, to the public use.

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In every aspect in which the subject of laying out the town in 1792, can be viewed, the conclusion is irresistible, that this slip was reserved from that part of the land set apart and laid out for said town. The idea of an intent to dedicate this slip to public use in 1792, is repelled, not only by direct testimony of the only active agent, who surveyed and superintended the laying out of the town, but by the other facts and circumstances hereinbefore detailed, which can be made to harmonize upon no other hypothesis, than that of its exclusion from the limits of the original plan of the town.

II. In 1795, it is probable that the inconvenience resulting to the inhabitants of Newport, from an exclusion of the ground in front of said town, from its defined limits, as laid out in 1792, and its reservation by the proprietor, began to be felt. It had not yet been incorporated, and we have a right to infer, there were but few inhabitants. In August, 1795, a re-survey was made by Roberts, and on the 14th December, 1795, the town was incorporated by an act of the legislature, approved that day. By the first section of that act, "it is enacted that the land comprehending the said town, agreeable to a plat made by John Roberts, be, and the same is hereby vested in Thomas Kennedy, &c., as trustees." By the seventh section of that act, it is provided, "that such part of said town as lies between the lots and rivers Ohio and Licking, as will appear by reference to the said plat, shall forever remain for the use and benefit

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of the said town for a common : *reserving to the said James Taylor and his heirs and assigns, every advantage and privilege which he has not disposed of, or which he would by law, be entitled to.*"

This is the first intimation of any public use or right to this slip. The streets, as laid down under this re-survey, did not extend to the river, and this slip, not included in the one hundred and eighty acres as set apart for a town, is now, by the seventh section of the act of incorporation, made a part thereof, subject to the important reservation by James Taylor, of every privilege and advantage not disposed of, or which, by law, he could be entitled to. Upon the Roberts plat, the space of ground between the lots and the Ohio river, was designated, "*Esplanade.*"

The question occurs, what rights were included in the reservation by James Taylor, contained in the seventh section of the act of incorporation ?

We answer, that the exclusive ferry franchise, as well as all incidental rights of wharfage. As to the exclusive right to this ferry on behalf of Taylor, we are saved any argument, because the point has already been settled, and adjudicated on by this court. The ferry had been constantly run across the Ohio from Newport, from 1794, by James Taylor, of Virginia, under his grant from the Mason county court, in that year, until the year 1799, when he conveyed it, with all his interest in the ground in front of Newport, to his son, General James Taylor, of Kentucky. It was run by him exclusively and continuously, until 1807, when, in consequence of the passage of the act of 1806, he applied, in person, to the Campbell county court for a grant of this ferry, in his own name, which was granted him. He continued to run it until the period of his death, in 1848, and it has been run without interruption, by his executor and heirs, ever since, until this effort of the defendants.

In 1830, the trustees of Newport applied to the Campbell county court, for the grant of a ferry from

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Newport across the Ohio, which application was overruled, and an appeal taken to this court, when the judgment of the Campbell county court was affirmed. A reference to the opinion of this court in that case, (6 *J. J. Marshall*, 134,) will show that the exclusive ferry privilege was in James Taylor; that the right of common as secured to the people of Newport, was not inconsistent with this exclusive ferry privilege in Taylor. The court incline to the opinion that the legal title to this slip or common in front of said town, was not vested in the trustees by the act of 1795, but still remained in Taylor. But if the divestiture of the legal title out of Taylor, had taken place, their judicial construction of the act of incorporation was, that such retention of the legal title by Taylor was not necessary to secure him, not only the ferry franchise, but all other advantages intended by the compact between the said Taylor and said town, and which the legislative act of incorporation fully effectuated. This court also held, that the expressions in the seventh section of the act of incorporation, "*every advantage and privilege which he, Taylor, had not disposed of,*" could not be restricted to the ferry which had been granted him, but, that the words used by the legislature, imported other advantages and privileges, and that this reservation was fully legalized by statute. What other privilege or advantage more important than that of wharfage, when the town should become a city? This court also held, that the following words in the first section of the act of incorporation of Newport, "*except such parts as are hereafter excepted,*" applied also to the common, and was a clear indication in addition to the language in the seventh section, that the proprietor did not intend to part with the legal title to the common. The attention of the court is called especially, to the fact that both the plats of 1792, as well as that of 1795, were before the court, as is shown, not only by a reference to the record filed as an exhibit, with the plaintiff's petition, but by a direct reference

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by this court to Hubbard Taylor's testimony, already commented on. If, therefore, this court, with the plats of 1792 and 1795, both before it, with the indorsement on the plat of 1795, of an Esplanade or common, judicially adjudged, that the plat of 1795, and the act of incorporation of Newport, did not divest the proprietor of the legal title to the common, nor deprive him of the benefits of an exclusive ferry privilege from said common, as well as all other privileges not inconsistent with a right of common, how could the plat of 1792 have that effect? Is not, therefore, this decision an adjudication upon both plats, and a full adjudication on his title to this common, and all its incidental privileges not inconsistent with a right of common? And again, if the right of an exclusive ferry privilege in Taylor, as held by this court, is not inconsistent with a right of common, as secured to the town, in what particular does a right to collect wharfage, reserved in the same way, upon wharves which Taylor has contributed largely in erecting, and over which he has exercised the exclusive use, militate against the right of common in the law? We refer the court, in support of this claim of wharfage, to 1 *Yeates*, 167; 9 *Sergeant & Raule*, 26; 3 *Watts*, 219, as abundantly establishing the fact, that if the legal title to this common is in Taylor, with the exclusive ferry privileges, and that other advantages not inconsistent with a right of common have been secured to him by the legislative act of incorporation, his right to collect wharfage is unquestioned.

The case of *Rowan's executors vs. The Town of Portland*, 8 *B. Monroe*, 254, does not militate against this claim; and for the simple reason, that the court held, in that case, that there had been a public dedication by Lytle, of the slip of ground on which the wharves had been erected. The court deeming the right to erect wharves an individual right, no one had the privilege, against the consent of the town, to erect a wharf on ground dedicated to it; but that such a

right, in consequence of the dedication of the common, was in the town itself, and might be used by it in increasing its commercial advantages, by building up wharves, and charging moderate tolls. If the town possessed the right, as in that case decided, it is clear no one else could possess it.

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In the case at bar, however, by the opinion of this court, in the case of *Trustees of Newport vs. Taylor*, already cited, Taylor is clothed with the legal title to this common—has reserved every advantage and privilege not inconsistent with a right of common. Is the right to erect wharves and charge wharfage, inconsistent with this common? Far from it. As this court remarked, in *Rowan vs. Town of Portland*, 8 B. Monroe, 254, the making of a proper wharf, with reasonable tolls for its use, would not necessarily obstruct the public access to the river, but might be advantageous to the town, as a place of commerce, and in that case, was one of the uses for which the slip was dedicated; and it was not understood to be reserved as an individual right, by the proprietor.—To render the question, as we think, perfectly conclusive, we beg to quote the language of this court, in the case last cited, on the direct point of a right to wharfage, where there has been such a reservation of private rights by the proprietor, as this court has decided in 6 J. J. Marshall, was reserved by Taylor. The court say: "*Although it could not have been urged in support of the public right, to the destruction of private rights, plainly reserved in the dedication, it may and should operate as corroborative of the public right, when claimed as a part of the dedication, to the beneficial enjoyment of which it is essential, and which was made without any reservation of private right, either express or implied.*" (8 B. Monroe, 258.)

Taking this decision at law, and harmonizing it with the judicial construction given by this court, to the act of 1795, incorporating the town of Newport, in which it is adjudged, Taylor reserved, by legisla-

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tive enactment, every right and privilege not inconsistent with a right of common, we think his right to both a ferry and wharfage, clear and unquestionable.

III. The question now occurs, what effect have the two adjudicated cases of Trustees of Newport against Taylor, and the city of Newport against Taylor's heirs, upon the rights of the defendants in this controversy? As to the *ferry right*, we should regard that there could be no diversity of opinion, that the town and city of Newport were completely barred by the adjudicated cases referred to. Such I understand the ruling of this court to have been, in *Ben. Monroe*, 363, where judge Graham, in delivering the opinion of the court, says "*Ordinarily*, the failure of one application for a ferry, will not forbid another application by the same party. At one time there may be no necessity for a ferry, and at a subsequent period the public good may imperiously require it. At one time the applicant may have no such interest in the land as to entitle him to such a privilege; but he may subsequently acquire such an interest. In these and all such cases, the order of, or a judgment in one case will not prevent another application. But this case is presented in a different aspect. *Here, the city of Newport has precisely the same rights* and interests which the town of Newport had in 1830. No new or additional rights or interests have since accrued to the city. If the act of 1795, vested in Taylor the exclusive right to ferry privileges, nothing has occurred since, so far as appears from the record before us, to take it from him or his heirs. In the case of *Morgan's heirs vs. Parker*, 1 *Dana*, 144, it is said that the court, having by two decisions, settled the identity of an object, called for in an entry, will, in subsequent cases, upon the same evidence, adhere to the former decisions. This was said in a controversy, not between the same parties. If that be a sound principle as to the mere identity of an object, certainly it is much more con-

clusively applicable in a case involving the legal construction of a statute."

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The learned judge then concludes that this court is not authorized to depart from the decision of the same tribunal in 1831, in its exposition of the statute incorporating the town of Newport, by which Taylor's right to a ferry was reserved.

As the owners of the Commodore claim under the city of Newport, all their right to this common, they are equally bound as privies by the foregoing decisions, though they were not parties.

It is gravely argued, however, by the learned counsel opposed to me, "*that as these decisions are upon questions of law, they are of no more weight in this case, than other decisions of the same court upon questions of law, arising on similar facts in other cases, and may be rebutted by such other decisions.*"

If the object of this proposition is to claim for this court a right to overrule its former decisions, and after being so overruled, that they are no longer of any binding force, I admit the statement as undoubted law.

I challenge, however, the production of a solitary case intimating a dictum overruling either of the cases, in 6 *J. J. Marshall*, or 11 *Ben. Monroe*.

It was warmly urged in the court below, that though not expressly overruled, the case in 6 *J. J. Marshall*, had been virtually overruled by the cases of *Rowan's Ex'rs vs. town of Portland*, 8 *Ben. Monroe*, 234; *Trustees of Dover vs. Fox*, 9 *Ben. Monroe*, 200, and that the doctrines of later cases were wholly inconsistent with those in 6 *J. J. Marshall*.

It might be a sufficient reply to this argument to say, that the case of the *City of Newport vs. Taylor's Acirs*, in 11 *Ben. Monroe*, 362, is a later ruling than either of the cases relied on by counsel for overturning it. If the case of *Rowan's Ex'rs vs. Portland*, or *Fox vs. Dover*, had contained doctrines repugnant to that of the *Town of Newport vs. Taylor*, it is probable this court would have overruled that case, and not

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have announced that they considered themselves bound by it. I deny, then, that there is anything in the cases of *Rowan's Ex'rs vs. Portland*, or of *Dover vs. Fox*, inconsistent with the principles settled in the two cases of *Newport vs. Taylor*. The results and conclusions are entirely distinct and different in the cases, and the state of facts requiring the application of legal principles were entirely dissimilar. So far from a diversity of principle in any of these cases, I confidently rely upon both the cases of *Rowan's Ex'rs vs. Portland*, and *Dover vs. Fox*, as direct authority, under the state of acts exhibited in this record, for the support of Taylor's claim to the exclusive ferry right and wharfage.

Had there been any proof, in the case of *Rowan vs. Portland*, like that of Hubbard Taylor in this record, is it believed that the town could have retained that ferry? Had it been shown in that case, as it was in the case of *Town of Newport vs. Taylor*, that the original plan of the town did not, and was not intended by the proprietor to include the slip binding on the river, is it seriously believed that the decision of this court would have given the slip to the town of Portland? Would the presumptions of a dedication, arising from the plat of a town on the river, not be capable of being contradicted and explained by proof *aliunde*? Had there been such a compact between Lytle and the town of Portland, carried out in good faith by a legislative enactment, like that of 1795, between Taylor and the Trustees of Newport, reserving and guaranteeing to said Lytle, not only an exclusive ferry right, but every other advantage and privilege which by law he was entitled to, not inconsistent with a right of common; can it be doubted that the decision of Taylor and Lytle in their respective cases would have been dissimilar? To give a negative answer to this question, is to shut our eyes to the total diversity of evidence introduced into the two cases, and to which entire different state

of fact is to be attributed, the different conclusions in the two cases.

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The case of *Trustees of Dover vs. Fox*, 9 Ben. Monroe, 200, is even still more dissimilar in its facts from the Newport case, than that of *Rowan vs. Portland*, just commenced on. In the case of Dover, Fox sold three-fourths of fifty acres to Murphy, Waters and Duke, for the purpose of laying out the town of Dover, which was done. They made a plat of the town, which was exhibited at the sale of lots, upon which plat all the space between the lots and the river, is designated as Water street. At the first sale of lots, it was announced by the auctioneer that the ground fronting on the river, was for the benefit of the town, as in the Newport case, it was announced by Hubbard Taylor that the slip next to the river was for James Taylor and not included in the plat. The question in the Dover case, was, whether Fox or the Trustees were entitled to the ferry right? This court under that state of fact, gave the ferry to the trustees of Dover, and say that whether Fox had parted with the legal title or not, was immaterial. If he had, then the title was in the trustees. If he had not, why then, that he held it in trust for them, and they were entitled to the beneficial use of the ferry.

It is wholly unnecessary to compare this case with that of the *Trustees of Newport vs. Taylor*, or show the dissimilarity of fact running throughout the two cases.

The case last cited, of *Dover vs. Fox*, is relied on by us, however, as supporting the position, that if by this act of 1795, the legal title to the esplanade had vested in the trustees of Newport, still Taylor would have had not only the wharves and a right to wharfage, but also the ferry right—having reserved these beneficial uses and advantages to himself from this slip, by the compact between himself and said town of Newport, in 1795, and acquiesced in ever since. This court has given judicial construction of that act of 1795, and twenty years after that first decision,

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still adheres to it. By it, Taylor is declared to have reserved every right and advantage in this slip, to which by law he would be entitled, not inconsistent with a right of common. This result would follow by the decision of *Dover vs. Fox*, whether the legal title was in Taylor or the trustees. Is then, the right of wharfage or ferriage inconsistent with this right of common? By the decision of the cases in 6 *J. J. Marshall*, and 11 *Ben. Monroe*, the right of ferriage is settled as not inconsistent, and in *Rowan's Ex'rs vs. Portland*, 254, it is expressly ruled, as already shown, that a right of wharfage is not inconsistent with a right of access by the people to the river, but that the building of wharves by the original proprietor of the town, where the right was reserved, would be beneficial to the town, by increasing its commercial advantages. By the words, then, "every privilege and advantage," as used by this court, in 6 *J. J. Marshall*, as having been retained and secured to Jas. Taylor, is included the right to wharfage and exclusive ferriage. If this be so, it follows that these defendants owning the Commodore, claiming under the town, are bound by the former decisions, and that the questions of ferriage and wharfage are *res adjudicata*.

IV. We confidently rely on the position, however, that if this court would have excluded Hubbard Taylor's testimony, and the other strong extrinsic facts supporting it, going to show that this slip was never dedicated to public use, and from the face of the map of 1792, inferred a dedication, it would long since have been freed from said dedication by the continued adverse use by Taylor, and those claiming under him, for more than fifty years; and the acquiescence therein, by the town of Newport. The testimony of McArthur, who states, that as late as 1843, he was, by direction of the city council of Newport, as an assessor of said town, directed to assess this esplanade to General Taylor, and which he did on his books. The testimony of George Perry, who proves, that while as a member of the city council

or board of trustees, the subject was discussed and the trustees of said town acquiesced and acknowledged said strip to belong to Taylor. The united testimony of Jacob Fowler, whom the defendants prove to have been a purchaser of lots in 1792, supported as it is, by Carter, Rugg, Tupman, show incontestibly that from 1804 Taylor has not only exercised acts of ownership over this slip by quarrying rock, continuously running his ferry from almost every part of the esplanade, from the mouth of Licking to East Row, forbidding trespassers; but that his exclusive control and ownership has been recognized and acquiesced in by the town of Newport, and its inhabitants for the past fifty years.

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That the statutes of limitation applicable to a case like this, and that the public right, as growing out of a dedication, had once existed, was subject to be defeated and divested by such a possession, was expressly held by this court in *Rowan's Ex'rs vs. the town of Portland*, 8 Ben. Monroe, 259. The proof of Perry goes to show that the trustees, in 1815 or 1816, knew of Taylor's claim to the esplanade, and acquiesced in it, while his exclusive ferry franchise from every part of said ground, was continuous for fifty-six years. If they, therefore, chose to slumber on their rights, with their belief of a dedication, it is too late now, to assert them if they had, against all our strong evidence, ever existed.

The permission given by General Taylor, to the citizens of Newport, to use this space as a common for ingress and egress, or for other purposes, in subordination to his rights, did not interfere with or destroy his possession. (*Irvin vs. Dixon*, 9 S. C. Harard, 33.) In that case the court say: "From the very nature of the wharf property, the access must be kept open for the convenience of the owner and his customers; but no one ever presumed that the property thereby became public instead of private, and especially under such numerous and deci-

sive circumstances as existed here, rebutting that inference."

The limitation was undoubtedly complete to quiet and defend any dedication made in 1792.

V. It is argued upon the otherside, that as the intercourse between the port of Cincinnati, Ohio, and the port of Newport, in Kentucky, by steamboats crossing the Ohio river, with freight and passengers, is now a matter of convenience between and among the States, carried on by navigation, and as such, is prohibited and regulated by the federal government, that consequently, no State can prohibit this commerce by any local statutory provision, nor grant any exclusive license or privilege to carry it on, under the name of ferry franchise, and that any such statutes are null and void.

A full answer to this proposition of learned counsel on the other side, might be offered by an *emphatic* denial of the existence of any statute in the commonwealth of Kentucky, on the subject of ferries, or otherwise, as interfering in the slightest degree, with the free navigation of the Ohio river. The unrestricted freedom of this national highway, for the purposes of navigation, is admitted to its fullest extent. The right of a free navigation of the Ohio, as guarantied by the compact between Virginia and Kentucky, to all the citizens of the United States, hitherto unquestioned and undenied, is not at all inconsistent with, or antagonistic to the undeniable and unlimited jurisdiction of the commonwealth of Kentucky, over all persons and things, within its territorial limits, where that jurisdiction is not surrendered or restrained by the federal government. The enactment by the Kentucky legislature, of any of its statutes on the subject of ferries, operating exclusively within its own territorial limits, is so undoubted an exercise of State sovereignty, upon matters entirely internal and municipal in their operation, that it is at least novel to find so undoubted a right, at this day, questioned. How State jurisdiction as

to ferry landings, purely local in its operation, and hitherto unquestioned in its exercise, is to be abridged and overthrown, from the acknowledged and guaranteed free navigation of the Ohio, is still more difficult of apprehension.

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In 1806, the legislature of Kentucky declared by statute, that no ferry should be granted to any one on the Ohio river, who was not the owner of the fee to the land on which said ferry was granted. The necessity and object of such a statute upon the Ohio, is self-evident. Its application extended exclusively to that river, and its provisions was justified by every principle of necessity and safety for the protection of certain property within the State. An attempt to destroy the efficacy and safeguards derived from such a source, by a complete overthrow of all our statutes concerning ferries on the Ohio river, is a bold assumption; the more important and alarming at the present day, since we witness daily the large amount of property, which their force has been impotent to resist. Upon what ground does this assault rest? It is alledged that as the steamer Commodore has been entered and enrolled as a licensed vessel, in the custom house in Cincinnati, under the coasting act of the United States, that she has a right to navigate the Ohio river. We admit it. And it is further alledged that as a refusal to permit her to land upon the private wharf of James Taylor, against his consent, or a refusal by the proper constituted municipal authorities of the State of Kentucky to grant her a ferry license, without a compliance with any of the requisites of our statute on the subject of ferries, that such a refusal is an infringement of the rights of the license of the federal government—so granted to this vessel—is a virtual denial of the free navigation of the Ohio; and that all such statutes, being in conflict with the commercial regulations of the United States, under which said license was granted, the regulations of commerce having been surrendered wholly to the federal government, such

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State laws must yield. This, if I comprehend it, is the ground on which our ferry statutes are to be overthrown. It is the only plausible basis on which an argument against their constitutionality can rest.

Let the question be met!

Have the States a right to enact laws, prescribing the terms and conditions upon which ferry franchises shall, or shall not be granted upon navigable rivers, that constitute the boundaries between separate States?

That the states possessed the power, before the adoption of the federal constitution, is undoubted. There were then thirteen sovereign states, wholly independent in themselves. Prior to the adoption of the federal constitution, they had been united under certain articles of confederation, entered into for the common purpose of achieving and maintaining their independence.

These articles proved inefficient for the avowed purpose of their adoption, and was followed by the adoption of the federal constitution. That instrument was the fruit of wise and patriotic councils. It was formed by the representatives of delegates sent and elected by those sovereign states. It was adopted by these same states as states. It was formed upon the altar of patriotism, but formed, I must be permitted to say, under the natural feeling, that the infant government was to be the weaker instrument as compared with the constitutions of the thirteen sovereignties which it was to unite. To the real apprehensions of the framers of the constitution in its *inability* to resist the state governments, (increased by the perception of the weakness of the articles of confederation, which proved ineffectual,) are to be attributed the latitudinous constructions of the powers of the federal government, over that of a strict construction of its authority to the granted substantive powers, and those absolutely necessary for its execution. Great as their wisdom was, they did not perceive in the infantile work of their hands, the

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mighty mastodon, whose colossal strides, are now so prone to break down all the bulwarks of state sovereignty. This constitution of the thirteen sovereign states, contained the specifications of the powers granted, and the purposes and object for which they were granted.

An examination of the constitution will show, that it contains a grant of exclusive powers, wholly yielded up by the states. It contains also a class of concurrent powers, to be exercised concurrently by federal and state governments. There are certain other powers exclusively to be exercised by the state governments. All powers not granted, are reserved by the states. To make a power exclusive in federal government, it should so expressly be declared, unless an exercise of that same power by a state government, would be incompatible and inconsistent with a similar power by Congress, or there is an express prohibition to the states.

With this short and imperfect sketch of these powers, there can be no doubt that Kentucky, as a sovereign state before the adoption of the federal constitution, had she been in existence, would have had the power to have made any regulation she thought fit, touching the grant of ferries, or the regulation of them. Vattel says: "The sovereign may forbid the entrance of his territory, either to foreigners in general, or in particular cases, to certain persons, or for certain particular purposes, according as he may think it advantageous to the state. (*Book 2, chap. 7, sec. 94*) So also, since the lord of the territory may, whenever he thinks proper, forbid its being entered, he has, no doubt, a power to annex what conditions he pleases, to the permission to enter.

The question occurs, if the power existed, has it been taken away by the federal constitution?

It is argued upon the other side, that it is a commercial regulation, and that the power to regulate commerce is, by the constitution of the United States, granted exclusively to Congress, that the Commodore,

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under the license of the United States, cannot be restricted by a state law, which must give way to the higher federal one.

We deny that it is a commercial regulation, and if we establish that it is not, the question is ended. We maintain that ferry privileges within Kentucky, are mere police regulations, wholly and exclusively within state jurisdiction.

In the forty-fifth number of the Federalist, we find, "The powers reserved to the several states will extend to all objects, which in the ordinary course of affairs, concern the lives, liberties, and properties of the people; and the internal order, improvement, and prosperity of the state."

If the statutes of Kentucky, regulating ferries on the Ohio river, be tested by this standard, it is clear that the power to enact them, is clearly within the delineation of power, as extracted from the Federalist. Looking to the *place*, we find it on the Ohio river, wholly within the territory of Kentucky, and therefore within its jurisdiction. Looking to the persons to whom the grants are made, they are land-owners within the same territorial limits; and, of course, within the same jurisdiction. If the purposes and objects of these statutes be scrutinized, it will be apparent, that *their enactment* was to subserve the commercial facilities of the people of the commonwealth, by keeping up constantly safe ferries across the Ohio river, and not leaving these facilities of crossing this river so essential to commerce, to the mere caprice of any who might establish them to-day, and as quickly abandon them to-morrow. If we look to the requisition of these statutes, that the grantees of ferries on the Ohio, should be men of substance, and not of *straw*; that they should be the owners of the fee simple title to the land on which said ferry was granted, we shall find that the welfare of the people sternly demanded their enactment. Lastly, if the penalties denounced by the statute be looked into, requiring the owners of all ferries on the

Ohio river, not less than the keepers, to be strictly amenable for all loss of property, escaping or destroyed at said ferry, the legislative intent in the exactions to protect the property of the people of the whole commonwealth is manifestly self-evident. While it was highly necessary and important to have the Ohio river dotted with ferries, it was equally important to guard these channels of ingress and egress owing to the particular location of the river, that the benefit of free intercourse and commercial advantage to be accomplished by their establishment should not become seriously detrimental, by affording the means for the escape of slave property.

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To deny to a state the unlimited jurisdiction over all persons and things within its territorial limits, unless restrained by the constitution of the United States, is to deny to it the essential means of accomplishing that which it was the purpose of the state governments to accomplish—the protection of life, liberty, and property. Had the power been denied to the *state governments* of exclusive control as to all municipal and internal police regulations, it is abundantly manifest, that the federal government could not have been formed. The very safety to persons and property of the people of the states, show that such a power could not have been surrendered or restrained; but that it is complete, unqualified, and exclusive in the state government. Such was the unanimous opinion of the supreme court of the United States, in the case of *City of New York vs. Milne*, 11 *Peters*, 130, 138, as expressed in the lucid opinion of that eminent jurist, P. P. Barbour, and from which the foregoing statements as to the powers of the state governments, have been almost literally taken.

If then, these ferry statutes are mere internal police regulations, under the authority of that case, together with many others that could be cited, they are clear exercises of legitimate state sovereignty, nev-

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er surrendered or restricted, but retained by the states, and undoubtedly constitutional and valid.

VI. It is still insisted, however, that inasmuch as these ferry franchises are exclusively granted to the owners of the soil, that where these grantees of such privileges *own the landing* on the Ohio river, for some distance, it empowers them to prevent the landing of other boats, restricting thereby the right of the free navigation of the Ohio and interfering with commerce, the exclusive regulation of which has been committed to Congress.

In support of this doctrine, we are referred to the case of *Gibbons vs. Ogden*, 9 *Whcaton*, 1, which is confidently relied on as a case directly in point.

The point decided in *Gibbons vs. Ogden*, was, that the acts of the legislature of New York, granting to certain individuals the exclusive navigation of all the waters within the jurisdiction of that state, with boats moved by steam, for a term of years, are repugnant to that clause of the constitution which authorizes Congress to regulate commerce, so far as the said acts prohibit vessels licensed according to the law of the United States for carrying on the coasting trade, from navigating said waters.

In expressing that opinion and the reasoning which led to it, the court do decide, that the power over commerce included navigation; that it extended to the navigable waters of the states; that it extended to navigation carried on by vessels exclusively employed in transporting passengers, but the utmost of the opinion, after all, is, that should the law of New York, granting an exclusive right to the waters of that state be upheld, and thus exclude a vessel licensed by the government of the United States, to navigate the same waters, that the two statutes would be in conflict, and that under such a collision the state law would have to yield, and that therefore, the law of New York was void.

This case falls far short of being direct authority for the unconstitutionality of our ferry laws, admit-

ting every proposition to be true, as stated by the court.

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The facts of one are in striking contrast to those of the other.

The ferry laws of Kentucky, operate on land wholly within its territorial limits, and over which the state professes an acknowledged jurisdiction for all internal regulations; while in *Gibbons vs. Ogden*, the laws of New York, pronounced unconstitutional, attempted to operate over a large extent of navigable water, over which the court say the power to regulate commerce extended. In the case at bar, the subject on which the Kentucky statutes operate, are persons whose rights and duties are rightfully prescribed and controlled within the territorial limits in which they are formed; while in the case of *Gibbons vs. Ogden*, the subject matter was a steam vessel claiming the right of navigation in navigable waters. Under such a state of facts, how can that case be relied on as authority for overthrowing the ferry statutes of Kentucky?

But again: In the case of *Gibbons vs. Ogden*, 9 Wheaton, 203, Chief Justice Marshall says: "That inspection laws may have a remote and considerable influence on commerce, will not be denied, but that a power to regulate commerce is the source from which the right to pass them is derived, cannot be admitted. The object of inspection laws is to improve the quality of articles produced by the labor of a country; to fit them for exportation; or it may be, for domestic use. They act upon the subject before it becomes an article of foreign commerce, or of commerce among the states, and prepare it for that purpose. They form a portion of that immense mass of legislation, which embraces everything within the territory of a state, not surrendered to the general government; all of which, can be most advantageously exercised by the states themselves. *Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a*

This would seem to be decisive of the question. If anything else be wanting, I ask the attention of the court to the argument of Mr. Webster, in answer to that of Mr. Emmett, in this identical case, where it is conceded that the regulations of ferries, especially on lake Champlain, are not within the power of Congress, but are legitimate subjects of state regulation, as part of the internal police of the state. I press upon the attention of the counsel upon the other side, that Mr. Emmett cites the ferries on lake Champlain, (the boundary between two states,) which were conceded by Mr. Webster, (who was opposed to him,) to be within the subject matter of police regulations belonging to the states, and not to the general government. In further support of the proposition, that these statutes regulating ferries, are entirely subject matters of police, and internal regulations never surrendered to the general government, but expressly reserved by the states, I cite *New York vs. Milne*, 11 Peters, 156; *Ogden vs. Gibbons*, 9 Wheaton; 1 *License Cases*, 5 Howard, 624; *United States vs. New Bedford Bridge*, 1 Woodb. & Minot, 423; *Passenger Cases*, 7 Howard, 524.

It is believed that no adjudicated case can be found, in which the right of the state to control and regulate its ferries has ever been questioned. The fact that the river is the boundary between two states can, from the very reasons on which the power rests, make no difference.

I have endeavored to show that ferries are matters of police regulation, and as such, are clearly within the exclusive control of the state governments.— Were these franchises, however, to be tortured into regulations of commerce, it would be an internal one, and they would still, from their very nature, be subjects of exclusive state jurisdiction.

To have doubted this proposition, seems to me, wonderful. The *License Cases*, 5 Howard, 504-628,

are full to this point. The language of Judge Woodbury is so pertinent and apposite upon this express point, that I cannot resist copying it. He says:

"As a general rule, the power of a state over all matters not granted away must be as full in the bays, ports, and harbors within her territory, *intra fauces terræ*, as on her wharves and shores, or interior soil. And there can be little check on such legislation, beyond the discretion of each state, if we consider the great conservative reserved powers of the states, in their quarantine or health systems, in the regulation of their internal commerce, in their authority over taxation, and, in short, every local measure necessary to protect themselves against persons or things dangerous to their peace and their morals.

"It is conceded that the states may exclude pestilence, either to the body or mind, shut out the plague or cholera, and no less, obscene paintings, lottery tickets, and convicts. (*Holmes vs. Jennison et al.*, 14 *Peters*, 568; 9 *Wheaton*, 203; 11 *Peters*, 133.) How can they be sovereign within their respective spheres, without power to regulate all their internal commerce, as well as police, and direct how, when, and where it shall be conducted in articles intimately connected either with public morals, or public safety, or the public prosperity. (See *Vattel*, B. 1, ch. 19, sec. 219, 231.)"

"Nor is there, in my view, any power conferred on the general government which has a right to control this matter of internal commerce or police, while it is fairly exercised, so as to accomplish a legitimate object, and by means adapted legally and suitably, to such end alone."

So again, he says:

"There may be some doubt whether the general government or each state possesses the prohibitory power as to persons or property of certain kinds from coming into the limits of the state. But it must exist somewhere; and it seems to me rather a police power, belonging to the states, and to be exercised in

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the manner best suited to the tastes and institutions of each, than one anywhere granted or proper to the duties of the general government. Or, if vested in the latter at all, it is but concurrent."

So again :

"The states stand properly on their reserved rights, within their own powers and sovereignty, to judge of the expediency and wisdom of their own laws; and while they take care not to violate clearly any portion of the constitution or statutes of the general government, our duty to that constitution and laws, and our respect for the state rights, must require us not to interfere. (5 *Howard, S. C.*, 630-631.)

If these views be correct, it clearly follows that every state has not only an unquestioned right to prescribe the terms on which ferry franchises are to be granted, but to attach thereto any conditions or penalties which the safety or comfort of its population may demand.

If the power be a reserved right of the state, it follows that it cannot be exercised by the federal government; and this brings us to a consideration of the effects of the license issued to the Commodore, as a vessel engaged in the carrying trade, under the coasting act.

VII. We do not propose to discuss the question whether a ferry-boat, plying between Cincinnati and Newport, as such, can properly come within the provisions of the coasting act of the United States.—The question was raised before Judge Catron, on an information filed by the district attorney of the United States, the late P. S. Loughborough, against the steam ferry-boat plying over the Ohio river, between Portland, Kentucky, and New Albany, Indiana, for failing to comply with the requisitions of that act.—The owners of the ferry relied by way of plea, on their grant of a ferry franchise from the state of Kentucky, as exempting them from the operations of that act. Their plea was demurred to, and, after full argument, overruled, Judge Catron deciding, that

said act did not include steam ferry-boats between sister states. This decision was made in 1838. The whole proceedings before Judge Catron, are found in this record.

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Reference is only made to it to show, that although the lessee of this ferry, and one of the plaintiffs, chose to obtain a license, and have his ferry-boats enrolled under the authority of this case, it was wholly unnecessary for the purpose of keeping up his ferry. The decision of the venerable Judge Catron, will also be a fair set off against the opinion of the late secretary of the Treasury, (Corwin,) that ferry-boats on the Ohio river were within the provisions of the act, and had to be licensed and enrolled.

The question to be considered is—suppose they are within the act, what authority does the license from the United States custom house, at Cincinnati, give them to establish a ferry upon Kentucky soil, without obtaining any license from the proper state authorities, in derogation of our statute law, and in violation of private rights?

What privilege does this license of federal authority impart, except to authorize the Commodore to navigate the river, as a boat engaged in the carrying trade? Admit that the transportation of persons and property, between Cincinnati and Newport as a common ferry-boat, is a legitimate exercise of the carrying trade under this coasting act, under what pretense can it be claimed, that the owners of the Commodore have the right, against the consent of the state of Kentucky, to establish a ferry, and in direct violation of all her statutes in regard to ferries?—Under what shadow of claim, can the landing of James Taylor be appropriated without his consent, and in direct destruction of his own ferry franchise? If it be admitted by the other side, that no such landing can take place except by the consent of the owner, and the lease from the city of Newport is relied on as authorizing them to land on the Esplanade, the question then turns exclusively on the dedication

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of the common, and that being decided against the city of Newport, this controversy is disposed of.— Should it be admitted, however, that the city had the right to dispose of this landing, it will hardly be contended, that she could impart a ferry franchise which had been denied her as a town and city, by the competent authorities of Kentucky. Is it contended that the right to navigate the Ohio under this license, includes the right to land as a ferry-boat, on Kentucky soil, in derogation of her statutes?

If we have been at all successful in the views which we have attempted to advance, touching the exclusive jurisdiction of the states over ferries within their own limits, though said rivers be boundaries between the states, then this claim falls to the ground. If, however, it be claimed that this license from the custom house at Cincinnati, issued by the United States, authorizes the Commodore, as a ferry-boat, to transport passengers and freight between Cincinnati and Newport, in direct violation of the Kentucky statute, it must be under the power to regulate commerce, exclusively confined to the federal government.

By this reasoning, the whole control of ferries in the commonwealth of Kentucky, becomes vested in the federal government, and under its exclusive control. The commonwealth could not have even a concurrent jurisdiction of ferries, since in the regulation of commerce, where congress has acted, its action is supreme; and it is claimed that the coasting act is an exercise of such power. Where, then, would be the guards for the protection of our property? Should we look to congress to protect us, or look to the passage of some criminal law by the commonwealth of Kentucky; and when the non-resident owners of the various coasting ferry-boats, were indicted for an abduction of our slave property, trust to the governors of the free states for their delivery? What would become of the pilot laws, health laws, poor laws, inspection laws, quarantine laws, decided

again and again to be constitutional? They would undoubtedly all share the same fate of these ferry statutes of Kentucky. The commonwealth would be powerless and impotent to protect herself from the mid-day attempts of fanatic marauders, constantly to annoy her. These fearful results, the necessary but legitimate fruits of the construction of this coasting license, as claimed on the other side, are the strongest and clearest evidence of its utter absurdity.

It has, however, not been left to deduction. The supreme court of the United States say: "That a license to prosecute the coasting trade is a warrant to traverse the waters washing or bounding the coasts of the United States. Such a license conveys no privilege to use, free of tolls, *or of any condition whatsoever*, the canals constructed by a state, or the water-courses partaking of the character of canals, exclusively within the interior of a state, and made practicable for navigation, by the funds of the State, or by privileges she may have conferred for the accomplishment of the same end. The attempt to use a coasting license for a purpose like this, is, in the first place, a departure from the obvious meaning of the document itself, and an abuse wholly beyond the object and the power of the government in granting it." (*Veazie et al. vs. Moor*, 14 Howard, S. C., 575.)

The truth is, the grant of ferry privileges to owners of the land, is not a regulation of commerce, nor an obstruction of it. If James Taylor were the owner of the whole Ohio river front for miles, commerce would only be affected consequentially and contingently by it. He would have a right to collect his tolls, and the federal government itself would be compelled to pay them, as the government does in the use of our turnpikes, railroads, and canals. Nor is the passage of our ferry statutes an exercise by the commonwealth of a commercial power. Their adoption may, and probably does, greatly affect commerce. The state cannot regulate foreign com-

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merce, but it may tax the ship, or vessel, by which this commerce is carried on. The state cannot convey or regulate the mails, but yet may tax the coaches in which the mail is conveyed. (7 *Howard*, 402.) Yet, in both instances, the tax greatly affects it. So, too, in giving the commercial power to congress, or entering into a compact for the free navigation of the Ohio river, the commonwealth of Kentucky never intended to surrender, and never did part with that power of self-preservation, whose exercise may affect commerce, but which is retained as inherent in every organized community.

Nothing is more common than private wharves in the great cities of this confederacy. The defendants themselves, or some of them, are the owners of a private wharf in the heart of Cincinnati, from which the Commodore runs. None of the disastrous and mildew effects from private wharves, which have been portrayed upon the prospects of Newport, in consequence of the ownership of the wharf and ferry by Taylor, seem to exist in Cincinnati. The defendants seem to forget that, notwithstanding the decision of this court, both in 1831 and 1852, upon General Taylor's reserved rights to said common and said ferry, that the city of Newport has quadrupled her population, and that it is still rapidly increasing.

In every point suggested, the law is clearly for the plaintiffs. We ask upon our cross errors, that the title to the wharf be quieted, and that as to the other part of the decree, it be affirmed.

Morehead & Brown on the same side—

The decree in this case is assailed, 1st, on the ground that chancery has no jurisdiction, the ferry privilege not being a common law right, but merely a statutory franchise, with an ample legal remedy for the infringement of such right.

We suppose that this point is fully and clearly settled by authority. The case referred to by the learned counsel on the other side, of *Abney vs. Harris*, 5

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Johns. 544, was a *qui tam* action, under the peculiar words of a statute, which gave the right to no particular person, and in the case of *Livingston vs. Van Ingen*, 9 *Johns.* it was said to be essentially a criminal case. The whole doctrine, however, of the jurisdiction of the chancellor, has been ably reviewed by chancellor Kent, 9 *Johns.* 586-7, and the conclusion drawn, "that injunctions are always granted to secure the enjoyment of statute privileges, of which the party is in the actual possession," notwithstanding a legal remedy be also given. The very point here urged, was elaborately and ably argued in the case referred to, and on a thorough examination of authorities overruled by the chancellor. Chancellor Kent says: "The principle is, that *statute privileges*, no less than common law rights, when in actual possession and exercise will not be permitted to be disturbed, until the *opponent* has fairly tried them at law, and overthrown their pretension." The trials at law in the instance of this ferry, have twice resulted in favor of the present possessors of it. Two solemn decisions by the highest judicial tribunal of the state, have been rendered in favor of the testator of the present plaintiff. According to the doctrine attempted to be maintained on the other side, and the authorities referred to, this would and ought to withdraw this case from the influence of the rule insisted on; but we contend for the broader principle so clearly laid down and established by the great chancellor of New York, and respectfully invite the attention of the court to the authorities referred to by him, as conclusive of this question.

2d. It is contended that there is a defect of parties. The suit was brought in the name of the executor of James Taylor, sr., dec'd, and of the lessee, Robert Air. The ferry was originally granted to James Taylor, the elder, in 1794. In 1799 the land and ferry privilege were conveyed to Gen. James Taylor, and he continued to keep it until 1807, when it was granted in his name. He continued to hold it

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until his death, in 1848. It is known and is also charged in the bill, that the county court refused to admit Gen. Taylor's will to record, and during this period the heirs went into court and executed the ferry bond required by the statute. The statute requires that the owner of a ferry on the Ohio river, shall, in addition to the ordinary bond, execute a covenant to pay the owner of any slave all damage he may sustain by illegally transporting him across that river. This is also required of the devisee or heir of the ferry, and of the lessee. These bonds were all executed in this case, but because the heirs, while the will stood rejected, executed such bond, it is contended that it amounted to a new grant to them, and on that account they should have been made parties. The allegation of the petition was made in reference to the existing law, and was nothing more than a declaration that such bond was executed. The exhibit filed in connection with this allegation, shows conclusively that it was merely the execution of the statutory bond, to avoid the forfeiture of the ferry franchise. There can certainly be no defect of parties on this ground. There is just as little reason for urging a defect of parties on the other grounds urged. The executor and lessee were undoubtedly in the legal possession and enjoyment of this franchise, and if it has been improperly and illegally disturbed, they undoubtedly have a right to an injunction, to prevent an irreparable injury. For what purpose should the heirs or devisees be made parties? It is the injury at this time which is sought to be restrained. The effect of such injury may, and perhaps would, remotely affect the devisees, but the immediate and direct injury is to the lessee. He has become such with the consent and approbation of the county court, and having executed bond according to law, he is legally possessed of the franchise, and could in his own name alone, maintain a bill to protect his rights. It is argued "that the question is as to the very right—the grant—its validity, &c."

How can there be any question as to that? We had supposed that our right, the grant and its validity, were conceded, but that notwithstanding this, the defendants contended that they had the right to run their boat under the coasting laws of the United States; that our ferry franchise could not interfere with this right. The only question is, as to this part of the case, are the plaintiffs in the legal possession and enjoyment of this franchise, and are the defendants infringing their rights by *landing* their boat at Newport? It matters not, so far as this question is concerned, in whom the legal title to the Esplanade is; so far as this ferry is concerned, it must be taken and held to have been in the grantee of the franchise. This cannot now be collaterally questioned. This point is too well settled to need the citation of authority in its support. The legal title, it is clear, is not in the city of Newport. The learned counsel on the other side supposes it now to be in the heirs of James Taylor, the elder. Admit this to be so, and the want of proper parties, does not necessarily follow. But we think it is clear that the title is where the petition alleges it to be. The deed to Gen. James Taylor from his father, has been heretofore construed by this court, to embrace the Esplanade, and it is not now an open question. But if not, and the title is not in the city of Newport, the acquiescence of the heirs of James Taylor, the elder, bars them of any claim, and the title of Gen. Jas. Taylor is valid, by lapse of time. It was decided to be his land when his ferry was granted, in 1807, and he has claimed it ever since, and this court has twice decided that it was in him. It is believed that there is no plausible pretext for contending that there is a defect of parties.

3d. It is argued that the ferry is confined to a particular landing, York street, and that the franchise is limited to the right of carrying persons and property from the Kentucky shore to the opposite shore, and

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does not include the right of transportation from the opposite shore to the Kentucky side.

Suppose this is conceded, how does it tend to show that the appellants have a right to run their boat from the opposite shore, and to land on this *Esplanade*? The grant of the franchise was from this land, without designating any particular part of it, to the opposite shore. It is true that the termination of York street has been the usual place of landing, but it is also clearly shown that the right has always been claimed and exercised, of landing elsewhere on the *Esplanade*, whenever required by necessity or convenience. This, and the right to do so, is conceded. If under any circumstances, we have *this right*, is it not an end of the question? The right would be inconsistent with the claim of power by the trustees of Newport to lease the landing. The prohibited distance for another ferry, cannot have any influence on the right to land at different points. In very low water, the landing must necessarily be different from what it would be in a high stage. If the point of landing must be absolutely and definitely fixed, so as to measure with exact precision, the prohibited distance, would you take the high or low water landing, and would it follow if one was taken, that the landing would have to be there located, and forever confined to that spot? The prohibited distance could just as easily be ascertained under our construction of this franchise, as in the case above supposed. We cannot perceive the force of the argument arising from this view.

But this court has conclusively established (6 *J.J.M.*, 134,) the *Esplanade* belonged to Gen'l James Taylor. In that case the following points were decided:

1. "In 1799, James Taylor, sr., conveyed to James Taylor, jr., all his right to the land between the lots in Newport, and the rivers Ohio and Licking; and also, his right to the ferry, and to all incidental privileges."

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2. At that time the proximity of another ferry in town, presented no legal barrier to its establishment, if otherwise sustainable.

3. That the grant of a right of common *to the people* of the town of Newport, did not vest the fee in the trustees of the town. That the 180 acres did not include the common which had not been surveyed. "The first section vested in trustees" the land, comprehending the said town, according to the plat, and declares that they "shall be trustees of the same, *except such parts as are hereafter excepted.*" The seventh section declared "*that such part of the town*" should be a common, reserving to the proprietor "*every advantage and privilege which he has not disposed of.*"

4. That the exception referred to the common, and that the expression, "*every advantage and privilege,*" cannot be restricted to the ferry which had been granted, but implies generality, or plurality at least." The words import more than one advantage or privilege. When the town was established, the proprietor *had not disposed of the fee in the land*, but had disposed only of the right of common therein; and therefore, the act declared that the land "should forever remain for the use and benefit of said town for a common," reserving all rights which had not been "*disposed of,*" which means, "all rights not inconsistent with the right of common, which had been granted. The fee and all other rights, not inconsistent with a right of common, were retained by the proprietor.

5. That this construction is fortified by the evidence of Hubbard Taylor, strengthened by the lapse of time, the uninterrupted enjoyment of the franchise, and sustained by the exception contained in the first section of the act.

If this decision is law, and at all events the law of this case, the learned counsel virtually concedes, and as we understood him, did fully admit, in argument, that the case as it stands is against him. If the land is ours, the fee in us, as never having been *disposed*

of, and right appurtenant to it, belongs to us, except the right of common only, what right has the ferry-boat called the "Commodore" to land on it against our consent? Or what right have the trustees of Newport to lease a landing to her proprietors? That it does give a correct construction of the act of 1795, establishing the town of Newport, and must control the rights of the parties, has been fully established in the case of the *City of Newport vs. Taylor's heirs*, 11 B. Mon., 361.

In that case it is re-affirmed that the proprietor had not disposed of the fee in the land between the lots and the river, but had only disposed of the right of common therein, and had retained to himself, *all rights not inconsistent with the right of common*. In this case the court refers to the case of *Morgan's heirs vs. Parke*, 1 Dana, 144, as authority for not departing from a construction given by their predecessors. In this latter case, the identity of an object called for in an entry, had been twice settled, and the same question arose between different parties upon the same evidence, the court felt itself concluded.

The same evidence *precisely* is before the court in this case as in the two cases in 6 J. J. M., and 11 B. Mon. This court felt itself constrained to adhere to the construction given to the statute of 1795, in 6 J. J. M., and after having thus adhered to it, and re-affirmed its principles upon the same identical evidence, it is asked to depart from it. We assume that this cannot be done. If so, what possible claim can the Commodore have to run as a *ferry-boat* from Newport to Cincinnati? This right was twice refused to Newport upon the ground that the land was Taylor's; that the town had nothing but a right of common—and now the proprietors of this boat, claiming under a lease from the trustees, ask to do what was refused to their lessors. But it is contended if they cannot ferry *from* the Kentucky shore, that they can ferry *to* it. If the land is ours, they are met at once by that objection. They cannot land under an authori-

ty that has no right to confer it. The decisions already commented on, show that the trustees have no such right, and therefore cannot confer it on others. But such landing is expressly prohibited by our statute. The Commodore does not pretend to run under a ferry license, but is really transporting passengers and property as a ferry-boat, under a coasting license. The case comes directly within the interdiction of the statute, which cannot be evaded, unless by considering it as overruled by a law of the United States, and this brings us to the consideration of that point.

4. We consider this as so fully settled by authority, and it has been so fully argued in the printed brief filed in this case, that but very little is left to be said.

We beg leave only to file herewith an opinion of justice Catron, in the case of the *United States vs. Kalfus*, owner of steamboat Portland, as bearing on this point. There is also a decision in the last volume of *Howard's Reports*, of a ferry case opposite Keokuk, where this question was alluded to and summarily disposed of as unworthy of discussion.

There is scarcely a decision upon the commercial clause of the constitution, which does not fully recognized the right of the states to grant exclusive ferry privileges, and we may add, that all of them concede the jurisdiction of a court of chancery to interfere in restraining the infringement of statutory rights.

These suggestions are thrown in in addition to the printed brief already filed.

Chief Justice MARSHALL delivered the opinion of the Court.

February 8.

In 1785, a patent was granted by the commonwealth of Virginia, to James Taylor, for 1,500 acres of land, at the junction of the Licking and Ohio rivers, lying on both rivers, and above the mouth of Licking. In 1791 and 1792, Hubbard Taylor, son of the patentee, laid off a portion of said land, at the

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confluence of the rivers, into streets and alleys, as a town, to which he gave the name of Newport; and made a plat or plan thereof, representing it as situated on the banks of the said rivers, at their junction; and representing, between the Ohio river and the lots fronting on it, a street, and between it and the river an open space, extending to the river, without any line or letter upon it. This space included a narrow and irregular strip of land on top of the bank, and extended to the water's edge. Whether the line dividing the front street from this open space was unbroken, or had breaks or openings opposite to the cross streets coming into it, is not entirely certain, nor is it deemed very material. Besides this representation of the town, the original plat or map had upon it a writing executed by the attorney of the patentee, stating the conditions upon which the lots were to be sold or donated. But these related principally to the terms of payment, and the improvement of the lots by purchasers, and intimated no reservation to the proprietor of any right not indicated by the plat and the fact of his ownership. It appears that some lots were sold and conveyed by reference to this plat, before August, 1795, when a re-survey was made by John Roberts, under the direction of James Taylor, a son, and then the attorney in fact of the patentee, and a new plat was made. By this re-survey and plat, the town was extended up the Ohio river somewhat beyond its original limits. Upon the space between the additional lots and the river, were written the words, "a common;" and on that between the original lots and the river, were written the words, "The Esplanade, to remain a common forever." The conditions indersed on the original plat were transferred to this new one, but the forfeiture for non-improvement within three years, which was one of the original conditions, was relinquished. Whether there had been any improvements, or were any actual residents within the town, or how many, when this re-survey was made, does

not certainly appear. It seems, however, that in January, 1794, the county court of Mason county, in which Newport was then included, had, on motion of James Taylor, (the patentee,) established a ferry from his lands on the Ohio river, over the same, in front of the town of Newport, to have and receive the same fare as is allowed from the opposite shore; and in the same year the same court had, on motion of — Bartle, to whom a lot fronting towards the river had been conveyed, granted to him a ferry across the Ohio, from Newport. But in 1795, this court, upon the appeal of James Taylor, reversed the order making that grant, because it did not appear that Bartle had any land on the Ohio river, and the ownership of land on that river, has been made by statute necessary to the grant of a ferry across it, from this side.

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In September, 1795, there seems to have been a public sale of lots in Newport, made, of course, by the new plat. But how many lots were sold does not appear. And in December, 1795, an act was passed to establish the town of Newport, then included in the county of Campbell. This act vested the "land comprehended in said town, agreeably to a plat made by John Roberts," with certain exceptions, in certain named trustees; and, besides other provisions for keeping up the town, provided in the seventh section, "that such part of the said town as lies between the lots and the rivers Ohio and Licking, as will appear by reference to said plat, shall forever remain for the use and benefit of said town, for a common; reserving to the said James Taylor, his heirs and assigns, every advantage and privilege which he has not disposed of, or which he would by law be entitled to."

Up to the passage of this act the legal title to all the land "comprehended in said town," except the few lots which had been effectually conveyed to purchasers, had remained in the original proprietor.— In 1799, James Taylor, the patentee, conveyed to

covered by his patent, the boundary of which, as described in the deed, began at the upper corner of the patent, on Licking river, and ran with the back line to certain objects called for, thence to the Ohio river, so as to include Duck creek, and to a corner described, and down the Ohio to a large poplar, mentioned as being the upper boundary of the town of Newport, on the Ohio, "and thence along the several boundaries on the land side of said town of Newport, as ascertained and established by law, and the recorded plat, &c., until the line strikes Licking river;" thence up the same to the beginning, so as to include all of the patent below the upper line of the land conveyed, "except so much as has been appropriated in manner aforesaid for the town of Newport; and also all right and title which said James Taylor, the elder, now hath, or is entitled to, or may hereafter have, or be entitled to, of, in, or to, any ferry, or ferries, from said town of Newport, and every part thereof, over and across both said Ohio and Licking rivers," with all and singular the advantages, privileges, emoluments, &c., of said land, and the ferry, or ferries, hereby granted, &c., and every part thereof. If the slip between the lots and the river was a part of the town of Newport, as established, &c., and the title remained in James Taylor, of Virginia, it would seem not to have passed by this deed, unless under the transfer of the present and future ferries, which may have been supposed to pass such title as the grantor had, and as was necessary to sustain the ferry or ferries referred to.

In 1806 an act was passed, by which, after reciting that the county courts of counties on the Ohio river had, under a previous act, granted ferries across said river—that their authority in such cases had been doubted, and that it was reasonable that the ferries so granted should be confirmed, it was enacted that ferries which had been granted in pursuance of the requisitions of said act, be confirmed, provid-

ed that the grantee shall enter into bond, &c. A general authority was also conferred upon the courts of counties lying on the Ohio, to grant ferries across said river, under a restriction as to the distance between them, and a penalty was denounced against transporting persons, &c., across the river to the opposite shore, without authority, &c. And, in June, 1807, an order was made by the Campbell county court, which, after reciting the previous grant by the Mason county court to James Taylor, of Virginia, of ferries across the Ohio and Licking rivers, also the provisions of the act of 1806 respecting ferries which had been granted across the Ohio, and that it satisfactorily appeared that James Taylor, of Virginia, had, by deed, &c., conveyed to James Taylor, of this (Campbell) county, a fee simple estate in said ferries then established, or to be established, in the town of Newport, thereupon grants or establishes a ferry to "said James Taylor, of Campbell county, in front of the town of Newport, across the Ohio, to the opposite shore, under the law aforesaid, and to be allowed the same rates," &c., &c. And the grantee thereupon entered into the bond required by said act, as owner of the land.

In virtue of these grants, the ferry across the Ohio was carried on under the authority, first of James Taylor, of Virginia, and then of James Taylor, of Campbell county, Kentucky, perhaps from the date of the original grant until the death of the last mentioned James Taylor, in 1848. It had for many years been managed and carried on by his lessees, of whom one was in possession under an unexpired lease at his death. After which, his will being for some time in dispute, a ferry bond was executed by his heirs; and upon the establishment of his will, which authorized his executor to lease the ferry, a bond was executed by the executor, and also by the lessee, Robert Air, under the requisition of the act of 1852. For many years open ferry-boats and skiffs were alone used at this ferry, as at all others in the state. In

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the progress of time, and business, and improvement, a horse-boat was used, and then a steam-boat, and for some years past two steam-boats have been used for the transportation of persons and property by this ferry. For many years the ferry-boats and skiffs landed and received, or put off their passengers at different parts of the shore in front of Newport, according to convenience or necessity. But for many years past the landing has been generally, and almost exclusively, at the foot of York street, except that when the water has been extremely low, the boats have landed, on a bar in the bed of the river, opposite to, but at some distance from, the foot of East row (street.)

In 1830, the trustees of Newport applied to the county court of Campbell county, for the grant of another ferry from Newport, across the Ohio, and upon the refusal of their application they brought the case to this court, by which the judgment of the county court was affirmed. For the reasons of this affirmation, founded mainly upon the construction of the act of 1795 establishing the town, and of the plat therein mentioned, reference is made to the opinion of this court, as reported in 6 *J. J. Marshall*, 134. When this application for a ferry was rejected, the population of Newport was probably not over 1,000 souls. Afterwards, in 1850, the population having increased to some 6,000 to 8,000, and the town of Newport having been previously incorporated as a city, an application was again made by the city for the grant of a ferry, which was then granted by the county court. But the order making the grant was reversed by this court, on the single ground, that in a proceeding between substantially the same parties, about precisely the same thing, and involving the same questions of construction, without any variation of facts by which that question could be affected, the court felt itself bound by the former adjudication, and especially by the construction which had thereby been given to the act of 1795 establish-

ing the town of Newport. The opinion delivered in this last case is reported in 11 *B. Monroe*, 361.

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In 1853, the steamboat *Commodore*, of near 200 tons, after having been duly inspected, enrolled and licensed for the coasting trade, by the proper officers of the United States for the collection district of Cincinnati, and those interested in her having obtained, for a nominal consideration, a lease from the city of Newport, of the wharf at the foot of Monmouth street, in said city, commenced carrying passengers and property, regularly and for profit, to and fro, across the Ohio river, in front of the city of Newport, the right to do so being claimed under color of the said license, and of the laws of the United States by which the licensing of steamboats is regulated and authorized. In January, 1854, James Taylor, the son and executor of James Taylor, who died in 1848, together with Robert Air, the lessee of Taylor's ferry, obtained, upon a bill filed by them, an injunction against this proceeding on the part of the owners and managers of the *Commodore*, and also of the city of Newport, which they charged to be a violation of the exclusive ferry right, so long held under the laws of Kentucky, in virtue of the grants which have been stated, and which have been sanctioned and protected by the repeated decisions of this court.

The bill claims, in substance, that in making the town of Newport, James Taylor, of Virginia, retained not only the legal title to the strip of land between Front street and the river, but also all rights therein which were not incompatible with the right of common by the citizens of the town; that the same title and rights were reserved to him by the act of 1795 establishing the town, as construed by this court in the two cases which have been referred to, and that the same were conveyed by his deed of 1799, to James Taylor, of Kentucky, who held and claimed them until his death, since which they belong to those who are entitled to his estate; and it is claim-

ed, not only that the ferry right across the Ohio river in front of Newport, which has been used and enjoyed since 1794, belongs exclusively to the devisees of said Taylor, as appurtenant to the legal ownership of the land on and adjacent to the river, but, also, that the right of wharfage was, and is, also, appurtenant to the same estate. And upon the allegation that the city of Newport has collected and received wharfage from boats landing upon, or at, the shore in front of Newport, alledged to be the property of said estate, and to have been for more than fifty years in the use and possession of James Taylor, of Virginia, and those deriving title from him, it is asked that the city may account for and pay to said executor the wharfage so received; also, that the lease from the city to the owners of the Commodore be annulled, and that said owners be compelled to account for, and pay, the ferriages received by, or for, them, and that they, and all others, be restrained from using part of the shore in front of Newport, for receiving or disembarking persons or property ferried across the river, in either direction, and that the exclusive possession and title of the ferry, and the ferry right, in front of Newport, as held and claimed under the grants to the Taylors, be quieted.

These are in substance the claims* and prayers made in the bill, which states with great minuteness and at great length, the acts and facts supposed to constitute a valid foundation of the rights asserted. The city of Newport and the owners and managers of the Commodore, made defendants, deny the rights and resist the relief claimed by the plaintiffs. The city answering at great length, contests most of the facts and legal inferences relied on in the bill, and going back to the origin of the town, claims that by the location and plat of the town, showing its position with respect to the river Ohio, and exhibiting an open space between the lots on the Front street and the river, and by the sale and conveyance of lots with reference to that plat, there was a dedication

of that space to the public uses of the town, and to all the uses appropriate to such a space, intervening between a navigable river and a town situated on its banks, and that this dedication, at first to be implied from the location of the town, and the exhibition upon the plat of a narrow open space between it and the river, without any mark or word indicating an intention of appropriating it, or any part of it, to private use, was afterwards expressly made by words, "a common," and "the Esplanade to remain a common forever," written on the different parts of this open space in the plat made by John Roberts, in August, 1795, under which sales were made in September of the same year. The city, therefore, claims, that although the title to said slip remained in James Taylor, of Virginia, the beneficial interest and use for all purposes to which, in its relative position to the town and the river, it was as public ground appropriated, were, by the sale and purchase of lots, in making which, they deny that there was any reservation which could affect the purchasers, irrevocably vested in those who, from time to time purchased lots or became inhabitants, and in the local and general public. She maintains that the legislature could not take away these rights from the town and its citizens; that the act of December 1795 was not intended and should not be construed to have this effect, and that if it did not vest in the trustees therein named the legal title to the slip between the lots and the river, neither did it, by the reservation expressed in the seventh section, enlarge or add to the existing rights of James Taylor, nor diminish or detract from those of the town and its citizens; that in the two cases in which this court decided against the application, and the right of the town and city of Newport, the only question really presented for decision, and really decided by the court, was whether the applicant had such title or interest in the Esplanade, as entitled her, under the laws of this state, to be the grantee of a ferry across the Ohio. And

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that her beneficial and equitable rights not having been involved in the contest for the grant of a ferry, were not the subject of decision in those, and cannot be precluded by anything which the court may have said in relation to them.

Upon these grounds, she claims that in whomsoever the legal title to the Esplanade, and the legal right to the ferry, may have been, the equitable and beneficial interest, not only in the Esplanade but in the ferry right, which was incident to it, belonged to the town and afterwards to the city of Newport. She therefore asks for an account of the profits, as having been received in trust, and for the benefit of Newport. And also for a conveyance of the Esplanade, &c., upon the same grounds, and upon the additional allegations and facts, that from a very short period after the organization of the town under the act of 1795, it has claimed and exercised undisputed jurisdiction over the esplanade, by extending, and at the cost of thousands of dollars, improving the streets through it down to the river; by protecting the bank from being washed away along a great part of the space in front of the town; by building and using for some years a market-house upon it; by the charge and collection of wharfage at different periods and at present, upon boats landing at the town; by the general and common use by the citizens and others, of the entire front on the river, without let or disturbance, and at their pleasure, for landing boats, for loading and unloading them, for piling and hauling away rock and lumber, and other things, they claim that the entire Esplanade, except so far as it has been used under the ferry right of Taylor, which use has for many years been almost exclusively confined to the landing at the foot of York street, has been in the exclusive possession and use of the town and the city, its inhabitants and the public, as the public ground of the town or city; that especially the landings and wharves at the foot of the several cross streets, improved under the authority and principal-

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ly at the expense of the town or the city, are public property, rightfully under the jurisdiction and control of the city, except so far as necessarily used for the purposes of the ferry; that the city, therefore, has the right to collect and receive wharfage for its own use, from boats and vessels landing at any part of the Esplanade, and especially from such as come to the improved landings and wharves; and that she had a right to make the lease of the wharf or landing at the foot of Monmouth street, to the owners of the steamer Commodore, who, as she avers, had a right, under the authority of Congress and of the license obtained by them, to use the same in carrying on the trade and navigation between the states of Ohio and Kentucky, and for the purpose of freely receiving and disembarking persons and property in the course of that trade upon and across the Ohio, the free navigation of which is secured by inviolable guarantees to all the citizens of the United States. The same right of navigating the river for the purpose of carrying on trade and commerce, between the two states upon its opposite banks, and of using the wharf or landing at Monmouth street, under the lease from the city of Newport, is asserted by the owners and managers of the Commodore.

This is the substance of the allegations and claims of the defendants, as presented in their answers to the bill. It appears, however, that after the injunction was issued and served, some change was made in the ownership of the Commodore, and under a ferry license obtained from the city authorities of Cincinnati, she was continued, or was again engaged in the business of transporting passengers and property across the river from Cincinnati to the landing at Monmouth street, in Newport, and was to some, but a more limited extent, engaged in transporting them from Newport to Cincinnati. Upon this being made to appear, a rule was made against the parties engaged, to show cause why they should not be attached for a contempt. No final disposition was

made of this rule. But upon the hearing, the injunction was perpetuated against the Commodore and the defendants, prohibiting them, and all persons claiming under them, from receiving at any part of the shore in front of Newport, passengers or property to be transported across the Ohio to the opposite shore, and also prohibiting them from landing in front of Newport, persons or property transported from the opposite side, and the entire privilege of ferrying across the river from both sides, was adjudged to be in the plaintiffs alone; the claim on the one side for an account of wharfage received, and on the other for an account of the profits of the ferry, were disallowed—as was also the prayer of the city for a conveyance of the ferry right to her. But the master was directed to ascertain the amount of ferriages received for the transportation of persons and passengers across the river by the Commodore, and other matters pertaining to the claim on that account and the Esplanade. This last branch of the decree being interlocutory, the proceeding which it directs is not before this court for revision, though its propriety would be effected by a denial of the right which it was intended to effectuate. The defendants have appealed from so much of the decree as perpetuates the injunction and defines its extent, and as to so much as denies and dismisses the claim of the city of Newport to a conveyance of the ferry, and for an account of the profits of the ferry. And the executor of Taylor has taken a cross appeal from so much as denies and dismisses his claim to an account of wharfage received by the city.

It will be seen from the detailed statement which has been made of the pleadings in this case, and from the decree which has been appealed from, that numerous as the subordinate questions of fact and law may seem to be, they may be reduced to three principal enquiries, relating, first, to the nature and extent under the laws of Kentucky of the ferry privilege, which has been so long exercised under

the grants to the Taylors; second, to the nature and extent of the privilege belonging to the Commodore and her owners in virtue of the license relied on, and and to the efficacy of the license to authorize a substantial interference with the ferry privilege, as held under the laws of Kentucky; and third, to the condition in law or equity of the Esplanade and entire space between the Ohio river and the lots in Newport, as being public or private property, and the incidental rights, public or private, which pertain to the legal or equitable property in the Esplanade, or space referred to. And under this last enquiry, will come the question as to the claim of the city to the ferry right and its profits, and as to her right to the wharves on the river front, and to wharfage, and to other uses of a public nature, in the space between the lots and the river.

Before entering upon these enquiries, it is proper to notice two preliminary objections made to the decree, which are, that a court of equity does not, and should not take jurisdiction of this right asserted and the relief sought by the bill, and that if the court may take jurisdiction, there is a want of parties capable of sustaining the bill, and of claiming and receiving the relief prayed for. Upon the first of these objections, it is admitted that the ferry right or privilege is not only a legal but a statutory right, protected by statutory penalties. But the enforcement of these penalties is not the only remedy by which the right may be vindicated. The common law furnishes in addition, the action on the case as a universal remedy for the disturbance of franchises, of which the right of ferrying for toll is certainly one; and it is difficult to find a good reason why this right made appurtenant to an estate in land, should be excluded from the benefit of the principle that the possession clothed with the title, may be quieted by the decree of a court of equity, against disturbance from adverse claims, or from the other principle, which, even where there has been an actual dis-

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1. The right of holding a ferry and its privilege of conveying passengers for toll, is a franchise in which the chancellor may protect the person in possession, not only by affording redress for the past, but to restrain its repeated disturbance; especially if the right has been judicially established. (9 John. Rep., 585.)

turbance for which the law furnishes redress by way of damages for the injurious act, yet if the injury be of a continuous nature, and be committed under a claim which indicates a continuance or frequent and constant repetition of it, authorizes the interposition of a court of equity, not merely to redress the injury actually done, which is the only direct operation of the legal remedy, but mainly to afford the more efficacious relief of preventing the vexation and harassment of continued disturbance, to be redressed by a multiplicity of suits, and of preserving and protecting the right by restraining the commission or repetition of the threatened injury. And if in ordinary cases it be necessary to put the right in litigation at law, and to establish it there before this more effectual jurisdiction of the chancellor can be invoked, such a requisition would seem to be inapplicable where the right is already established, and in fact originated by the judicial action of a tribunal having exclusive jurisdiction to grant the right; or, if the requisition be applicable, it would seem to have been substantially complied with, and its objects virtually attained, by defeating the repeated attempts to establish an additional ferry in opposition to the rights claimed under the grant to Taylor, the results of which attempts have in effect confirmed that grant, and effectually recognized the rights flowing from it. The nature and extent of those rights are defined by statute, and a court of equity is as competent to ascertain, and more competent to enforce and protect them than a court of law.

Other grounds besides that of furnishing a more adequate and complete remedy, and the only effectual one, might be referred to as sustaining the jurisdiction of the court of equity in this case. But whatever may be the theory on the subject, the jurisdiction in similar cases is now too well established in practice, and by reason and precedent to be successfully questioned. It is deemed sufficient to refer in support of this conclusion, to the cases of

Livingston vs. Van Ingen, 9 *Johnson's Reports*, in which, at page 585, Kent, chief justice, lays down the position and sustained it by numerous authorities, British and American, that "injunctions are always granted to secure the enjoyment of statute privileges, of which the party is in the actual possession, unless the right be doubtful." And it might be added, that the question of dedication, and the conflicting claim growing out of it, have been an ordinary subject of chancery jurisdiction.

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Upon the objection with respect to parties, it might be sufficient to say, that we do not perceive that the objection was made in the circuit court. And according to the 123d section of the Code, it comes too late, if made for the first time in this court. But waiving this ground, we are of opinion that although the grant of a ferry may be regarded to a certain extent as a personal trust, the right during the subsistence of the grant, is transmissible *sub modo* with the land itself to which it is appurtenant by descent, or devise, or sale, or lease—the consent of the county court having jurisdiction to grant the ferry, being required in case of sale or lease, and a new bond or covenant being required in all cases of a change of title, whether by act of the parties, or by operation of law. These and other regulations on the subject, not necessary to be mentioned, are contained in the *Revised Statutes*, relating to ferries. But by the will of James Taylor, to whom this ferry was granted in 1807, his son and executor, James Taylor, one of the plaintiffs, was authorized to rent out the ferry, and all other ferries which might be granted during his life, and to receive the proceeds, of which a part is specifically appropriated, and the residue may be subject to account; but there is no direct devise of the ferry itself, nor of the Esplanade, until his death. Such right therefore, as the testator had in the ferry, either descended to his heirs during the life of the executor, who as has been stated, executed bond in the county court, or it vested in the executor dur-

2. An executor, who by will was directed to lease out a ferry, could without uniting the heirs of the testator, maintain a petition in equity to be quieted in the enjoyment of the franchise.

ing his life, in virtue of the power given to him to rent it out and receive the rents, which necessarily included the power of superintending, controlling, and if necessary, even of using it, for the purpose of making the profits which were disposed of by the will, and it has been seen that he and his lessee executed the proper bond. If any shadow of title passed to the heirs, of whom the executor was one, they had no real interest, but the substantial and beneficial interest during his life, vested exclusively in him as trustee for the devisees, of whom he was also one, and if he had not the legal title, he had the power to pass it, and did pass it by his lease to Air. As trustee of an express trust, he had a right to sue without uniting his *cestui que trust* for the preservation of the subject, and in vindication of the right from which the profits were to be derived. And although his interest as executor was for life only, while the interest of his lessee was even more limited, we are of opinion that to the extent of these actually subsisting interests, united as they were with the possession, they as the parties whose rights and interest were directly affected by the acts committed and threatened, to the injury of the privilege which they claimed and were enjoying, had the same right to the aid of the court of equity for the protection of their interests, and to the full execution of its powers as far as necessary to that purpose, as if they, or one of them, had been possessed of the fee simple estate. They hold the possession, and are entitled to maintain their temporary right, for the benefit not only of themselves, but of those also who are to come after them, in remainder or reversion. If it were conceded that the loss or impairment of the present right claimed by the plaintiffs, the one as executor and the other as lessee, would not bar the claim to the same right by those who may become entitled in remainder, and that therefore the plaintiffs should be deemed incompetent to litigate the entire right, or to claim or have a relief com

mensurate with such litigation, this concession would only limit the extent of the relief to which they might be entitled, and would not tend to a total denial of all relief.

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Assuming that James Taylor, the testator, was entitled to the ferry under the grant of 1807, and by his long possession afterwards, we are of opinion that his will invests his executors with the substantial rights of a tenant for life, and makes him a devisee for life in trust. He is therefore to be regarded in equity, at least, as a tenant of the free hold, having the right to defend and maintain in that character, and at least to the extent of that interest, the title of which he holds an important portion. And we may here say, that whatever doubts there might be as to the efficacy and intention of the deed of James Taylor, of Virginia, made in 1799, to convey to James Taylor, the testator, any part of the land lying between the lots in the town of Newport and the Ohio river, which is represented in both of the plats, and regarded in the act of 1795, and recognized in the opinion of this court, reported in 6 J. J. *Marshall, supra*, as a part of the town, there is no doubt of the intention of the grantor to convey the entire ferry right, present and future, from the shore in front of the town, and from all parts of it. And whether this could or could not have been legally and effectually done, without conveying to the grantee the title to the soil itself, or some part of it, the grantee of that deed, used and held the existing ferry under it until 1807, when the court which had jurisdiction, considering him as having been invested by the deed with the ferry right which had been granted to his father, and as being therefore entitled to the benefit of the act of 1806, in confirmation of previous grants, established the same ferry in his name, by an order which was in effect a new grant of the privilege to him; and the same ferry has been continually used by him, or under his authority, from that day to this. The transfer of the then existing

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ferry privilege, and the subsequent renewal of the grant on the basis of that transfer, sanctioned as they are by a possession of fifty years, cannot now be questioned. And the ferry privilege, or right, as it has been used under the grants above mentioned, and with such rights as pertain to it by law, must be regarded as having been indisputably vested in the testator at his death, and as having passed by his will under such restriction, already referred to, as the law imposed.

3. The laws of Kentucky only profess to grant the privilege to ferry keepers, to convey passengers &c. to the opposite side of the Ohio river; and the same power and right is accorded to Ohio State, and to land at any public landing or wharf, or on private property, by leave to do so.

We come, then, to the first principal inquiry, what is the nature and extent, under the laws of Kentucky, of the privilege conferred by a grant of the ferry right across the Ohio river, by a county court having jurisdiction to grant it? And in answering this inquiry, we observe that the laws of Kentucky do not profess either to grant, or to secure or protect, the right of ferrying across the Ohio river, except from this to the opposite shore; nor do we find that there has been any attempt, by statute, to regulate or interfere with the transportation from the other side to this, under authority derived from the laws and government on the opposite side. But the right of any state or territory to grant, within its jurisdiction, the right of ferrying across the Ohio, has been uniformly recognized and respected, and, so far as we can discover, never denied. It will be recollected, that in the order of January, 1794, which granted to James Taylor, of Virginia, the first ferry from the town of Newport, he is authorized to charge the same fare that is allowed from the other side. This implies that there was, even then, a ferry from the other side, which, however, does not otherwise appear. It seems, however, that at different times since 1807, and while Taylor's ferry was in operation, there had been ferries from the other side, which were carried on for short periods, but of which none, so far as appears, was obstructed in bringing passengers, &c., &c., from the other side.

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The preamble of the act of 1806, under which the grant of 1807 was made to James Taylor, of Campbell county, recites, "that the county courts of several counties on the Ohio river had granted ferries across said river *to the opposite shore*. The first section of the act provides that the bond to be given, on confirming such grant, shall express in its condition, that whereas a ferry hath been established from the land of said ———, *across the Ohio river, to the opposite shore,*" &c. The third section authorizes the several county courts aforesaid, (that is, of counties on the Ohio,) to establish ferries across said river, *to the opposite shore*. And the seventh section denounces a penalty against any person not authorized by said county courts, or by this act, who shall transport passengers or property across said river, *to the opposite shore*. This act of 1806, provided that no ferry should be established on the Ohio, within one mile above or below an established ferry, unless it be in a town, or rendered necessary by an impassable creek, or *be opposite to some established ferry in the Ohio state*. An act of 1812 denounces a penalty upon any citizen of Kentucky who, without authority from the laws of this state, or of the state or territory *opposite to* an established ferry, shall transport passengers or property across the Ohio river, from the opposite shore to the Kentucky shore, within one mile in a straight line, above or below an established ferry, for any reward, or promise thereof. The act of 1836, which is confined in its operation to the county of Jefferson, imposes a penalty upon the owners, &c., of ferries established from the opposite side of the Ohio, and not having the grant of a ferry from the Kentucky side, for transporting, without arrangement with the owner of the ferry on this side, and to its prejudice, any person, or thing, with or without charge, from the Kentucky shore *to the opposite side* of the river. And the *Revised Statutes, Title, Ferries, section 14, page 360*, adopted in 1852, denounces a penalty against any one who shall, for reward, transport any person, or

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thing, across a water-course, from or to a point within one mile of an established ferry, *unless it be the owner of an established ferry on the other side* of the Ohio or Mississippi river, so transporting to such point on this side; and also against any owner (his lessee or servant,) of a ferry on the other side of either of those rivers, who shall so transport from this side without reward.

These statutes, and among them the Revised Statutes, which, as we suppose, contains the present law upon the entire subject, sustain fully the proposition first laid down in this part of the case, and establish the fact that Kentucky has never claimed the exclusive right of ferriage across the Ohio river except from this shore, and while she has interdicted the establishment of ferries from this side, within a certain distance of an established ferry on this side, she has constantly recognized the right of the authorities on the other side, to establish ferries from that side, without regard to the interdict. The Revised Statutes prohibits the transportation for reward across the river to or from either shore, within one mile of an established ferry on this side, unless by a ferry established on the other, which may transport to this side, and prohibits such transportation (within the interdicted distance,) from this side without reward, even by a ferry established on the other side. The opposite ferry is thus prohibited from taking passengers, &c., from this side within one mile of an established ferry, whether with or without reward, and all others are prohibited from either taking from this side, or landing upon it, at any point within the interdicted distance, persons or property transported or to be transported for reward across the river. To this extent the state claims jurisdiction, for the protection and preservation of her own established ferries, and by virtue of her sovereignty over her own territory, on which, in the cases prohibited, persons and property must be landed from, or received for transportation across the river. The

exclusive privilege granted to ferries established under the authority of this state, does not exceed the right thus claimed by the state, but is more restricted since it is subject to diminution by the establishment of ferries within the distance of one mile and a half on the Ohio river, in a town or city, or if an impassable stream intervenes. The right thus claimed by the state over its own territory on the river, and for the protection and benefit of its own grantees of the ferry privilege, it has not at any time denied to the states on the other side. Nor do we perceive that in any of the statutes which have been passed for the general regulation of ferries, and of the ferry right, she has overstepped the limits of that concurrent jurisdiction over the Ohio, which, by the 11th section of the compact with Virginia, is conceded to be in the states which possess the opposite shore of that river. Some comment was made by this court upon the effect of this concurrence of jurisdiction, in the case of *Arnold, &c. vs. Shields*, 5 Dana, 22, which arose under the act of 1836, above noticed. It was then said that this concurrence of jurisdiction gave or implied equal power over the common river, in the states on the opposite side, and that neither of the states referred to, could, consistently with the compact, exercise any authority over it, which would destroy, impair, or obstruct the concurrent rights of the other. If this be the true exposition of this provision of the compact, and it is certainly not too restricted, it has not been violated by the ferry laws of Kentucky, which concedes to the states on the opposite shore of the Ohio, the same rights on this subject which she exercises herself. As they make no discrimination in favor of the citizens of Kentucky, when not acting under authority derived from her, over those of other states acting without the sanction of public authority, derived from them, the inhibitions and penalties of these laws, must be regarded as the exercise, in good faith, of the undoubted right and duty of the states, as well on this as on the other

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side of the river flowing between them, to provide for and secure for common use, upon their respective sides, suitable means for the safe and speedy passage of persons and property across the river to the opposite shore. And if it be conceded that this common right and duty of the states on each side, gives no right to land the vessel used for transportation from the one side, upon the private property of individuals on the other, without their consent, it must also be conceded that the authorized vessel used for transportation from either side, may use for landing on the other, its freight, or persons, or things, either private property with the consent of the owner, or the public highways coming to the water's edge, or, subject to suitable charges, and at any rate by consent, the public wharves or other accommodations furnished on the shore for embarking and disembarking persons and property. These rights, existing on the side of the river opposite to that on which the right of transportation from its own shore is granted, do not imply nor flow from any authority in the state which grants the privilege of transportation from its own side, but which has no power or jurisdiction on the other. They are the individual rights of all persons to pass to and fro across the river; and whatever right may be supposed to pertain to the vessel itself, in the state opposite to that in which it was licensed, is derived not from the license nor from the authority which grants it, but from the rights of individuals of which it is the instrument. These rights of ingress and transit, dependent among nations absolutely sovereign, upon the general principles of international comity, or an agreement, and ultimately upon the will of each, so far as its own territory is concerned, have, unquestionably, a firmer foundation in the principles and provisions of the constitution, which establishes the union of the states, and secures the free and peaceful intercourse of their respective citizens. It is not inconsistent with these principles and provisions, nor with the rights they

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intend to secure, but is on the contrary, essential to the enjoyment of these rights, that the states bordering on a navigable river which flows between them, should possess and exercise the right of granting and controlling the privilege of ferrying from their respective shores, with such restrictions as to competition, as may be deemed necessary to secure the proper accommodations for travel and trade, and with such regulations as will secure a speedy and comfortable passage across the river; and which is more important to each or every state, separately considered, with such regulations and restrictions as may be necessary for the preservation of the property and rights of its own citizens, as to which none can be expected to judge so well as the state herself, and for which so long as she violates no right of others, none can better provide.— The public highways and thoroughfares extending to the rivers are the best indications of the places where transportation across them from either side is required for the public accommodation; and if free ingress is allowed at these points to all who, under the just exercise by the state of its essential conservative power, have a right to enter upon or depart from its territory, there can be no complaint of an excess of its own jurisdiction, or of an invasion of the rights of others. Nor is the restriction of the transportation across the Ohio river to the established ferries for one mile above and below those established on this side, and the exclusive privilege within that distance, secured to our ferries, for the transportation from this side, an infringement of the right to the free navigation of the Ohio river, secured to all the citizens of the United States. The primary object of that guarantee was to secure to the citizens of all the states, the right of navigation to and fro along the stream, for the purposes of trade and intercourse, and free from obstruction or impediment by the laws, or under the authority of any of the states along whose borders they might pass. But it could not

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have been intended to deny, and does not necessarily or fairly import a denial or impairment of the territorial rights and sovereignty of the states over their own soil adjacent to the river, further, at any rate, than in particular cases may be necessary to the use and enjoyment of the right of navigation itself. And if the right of crossing the river from shore to shore be included in the guarantee, still, as the establishment of ferries at convenient distances, and the regulation of them, with a view to insuring a safe and speedy passage from bank to bank, is absolutely essential to the effectual and beneficial enjoyment of the right by all, the exclusion of unauthorized competition, being a necessary means of keeping up for general accommodation, the established ferries, so far from being an interference with the free passage across, of those who desire to pass, is the best and only certain provision for the passage of those who are not themselves provided with the means of crossing. And we do not understand that persons residing on the river are prohibited from transporting themselves across it, by such means of their own as they are provided with. The exclusive ferry privilege, as it exists under our laws, having been thus minutely considered and defined, and the right of the state, as heretofore exercised, to grant and regulate it, having been shown not to be inconsistent with the just rights of others, but to be but the exercise of its duties in aid of the rights of individuals, it only remains to say, under this branch of the subject, that while the laws have, for the benefit of the public, given to the owners of established ferries, some exclusive privileges, they have also, for the benefit and security of the traveling and trading public, imposed upon them onerous duties, requiring them to furnish not only suitable boats for transportation of persons and property with comfort and safety, and to give them immediate passage across the river, and at rates fixed from time to time by the county court, but also to provide suitable accommo-

dations for reaching and leaving the boats, and as a measure of safety found necessary in the course of events, they are prohibited from carrying slaves across the river without the consent of their owners. Their duties in all of these particulars, are secured by bonds, to be renewed at short periods, by liability to damages, for injuries caused by neglect or breach of duty, by penalties, amounting in some cases, to a forfeiture of their privileges, and by a constant subjection to the supervision and control of the court of the county within which they are situated. They are, indeed, agents of the public, invested with important rights, as the consideration and means of performing important duties with which they are charged, and for the due performance of which, they are held to a strict scrutiny and a heavy responsibility.

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We think it manifest from what has been said, and there are other considerations tending to the same conclusion, that the privilege of ferrying for toll, and especially of ferrying across the Ohio river, which runs between this and other states, is a privilege grantable only by the public, and to be exercised under such regulations as the public may deem requisite for the safety, comfort, and convenience of all concerned; and that it is no less the duty, than the right, of the government which has jurisdiction over ferries, to exercise it with a view to the attainment of these ends. And this brings us to our second inquiry, which is, in substance, whether the license of the Commodore, under the laws of the United States, conferred on her, or her owners, the privilege of transporting persons and property, to and fro, across the Ohio river, between Newport and Cincinnati. If this occupation was not, as it most clearly was, an exercise, or attempted exercise, of the right of ferrying, for toll, across the river, it was a manifest violation of the statutes of Kentucky, unless the license be deemed equivalent to the grant of the ferry privilege from both sides of the river. But

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the Commodore was, in fact, engaged in the regular business of ferrying from shore to shore, under color of a license for carrying on the coasting trade. And it is contended that the power of congress to regulate commerce among the states, includes the power to regulate the navigation, and the vessels by which that commerce is carried on; that congress, under this power, having many years ago (in 1793) enacted regulations for vessels engaged in this trade, and provided for the inspection, enrollment and licensing of such as were adapted to it, whereby they were authorized to enter any ports of the United States, and land at any public places, for purposes of trade, the subsequent act of 1838, "to provide for the better security of the lives of passengers in vessels propelled by steam," requiring all such vessels to be inspected, enrolled and licensed under the authority of the United States, and prohibiting any, without such license, to transport passengers, or goods, on the lakes, bays, rivers, and other navigable waters of the United States; the license obtained under this act gave a similar right to the Commodore, and her owners, and especially when engaged in carrying on commerce between the states, to enter any ports, or open and public places, in the course of trade, and to receive and put out on the public wharves, and to transport on the Ohio river, to or from any port or place in Kentucky, to or from any port or place in Ohio, passengers and freight, constituting a part of the commerce between those states, of which a large amount passes, or is carried on, between Newport and Cincinnati.

If, by the operation of this act, every steamboat which receives the license provided for, is thereby authorized to transport persons and property across the Ohio, or any other navigable river, from bank to bank, or from state to state, situated upon the opposite banks, the power of the states to establish and regulate ferries, and to give them the protection required for their beneficial operation, is in effect nul-

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lified, or may at least be overborne and disregarded at the pleasure of every owner of a licensed steam-boat who may choose to exercise the privilege of ferrying in contempt of that power. If the power may be thus set at defiance with impunity, it is, in effect, no power. Its existence is but a name—its attempted exercise a mockery, a delusive promise, without the power of performance.

If it were conceded that the commercial power vested by the constitution in the congress of the United States, might be legitimately exercised in the regulation of ferries transporting persons and commodities across a river flowing between two states, and that where there is a conflict between the regulations enacted by congress, and those of the states, on the same subject, the latter must, under the mandate of the constitution, yield to the former; still, a power of this character, so long exercised without question, not only by this state, but by every other state similarly situated—a power essentially local, and in its immediate operation affecting local interests only—dependent for its judicious exercise upon local knowledge—founded on the jurisdiction and power of the state over its own soil, and the persons and property of its inhabitants, and necessary for the proper exercise of its rights and duties for the protection of its citizens and their property, as well as for the safety and convenience of others passing to and from its territory—a power of this character, whose existence, as a remnant of sovereignty left in the states, is thus sanctioned by time, thus approved by considerations of fitness, and thus demonstrated by necessity, is entitled to too much respect to be defeated by anything less than an unequivocal assertion, either express or by necessary implication, of the conflicting power, or to any greater extent than such conflicting power is exerted under the clear sanction of the constitution.

If the commercial power vested in congress may be exercised upon every subject, the regulation of

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which may more or less remotely affect the commerce between or among the states, which we do not admit, it would not follow, and cannot be admitted, that the mere existence of such a power granted, if granted at all, only for the general good of all, and for the promotion of harmony, and the maintenance of union among the states, should have the effect of depriving the states of all power of making any regulation which may remotely or incidentally affect that commerce. And the conclusion which, as it seems to us, is at once most consistent with the admitted supremacy of the constitution, and the constitutional acts of congress, and with the constitutional independence and sovereignty of the states, is, that there are some subjects which, although the regulation of them may incidentally affect commerce between or among the states, are either wholly excluded from the commercial power of congress, or are open to the legislation of the states until congress legislates upon them, and so far as it does not so legislate; and there may be different subjects coming under both classes. The proposition that the power of congress extends to all subjects, the regulation of which may, however remotely, affect commerce among the states, and that the mere grant of the power, though, not exercised, is a prohibition of its exercise by the states, is inconsistent with the essential rights of self-government and self-preservation which never were, and, so long as they retain a vestige of independence, never can, be yielded by the states. It may be admitted that the states have not the power to regulate the commerce between them, and yet be true that they have other powers, the exercise of which may incidentally affect that commerce; and the constitutionality of such an exercise of an admitted power, not directed to the regulation of commerce, but to the regulation of other subjects, or objects, within the jurisdiction and power of the state, cannot be questioned, and certainly cannot be denied, unless it come in conflict with some regulation

made by congress, in the legitimate exercise of its constitutional power to regulate this commerce.

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This, as we understand the case of *Gibbons vs. Ogden*, 9 *Wheaton*, p. 1, and 5 *Condensed Reports*, 563, is the doctrine, express and implied, of the opinion of the supreme court of the United States delivered in that case, by the chief justice; and with some differences of opinion among the successive judges of that court as to the extent of the power granted to congress to regulate commerce, and as to the question whether, and how far the grant is exclusive, the same doctrine has been substantially maintained to the present time. In the first place, it is conceded in that opinion that the power of taxation necessarily remaining in the states, is shown by the restriction upon it in the second clause of the tenth section of the constitution, to have included, in the opinion of the convention, the power of laying duties on imports and exports, and tonnage duties, although they operate upon commerce. And again, in speaking of inspection laws, which are also recognized by the same clause as being within the power of the states, and which are admitted to have a remote and considerable influence on commerce, though not derived from the power to regulate it, the chief justice says: "They form a portion of that immense mass of legislation, which embraces everything within the territory of a state, not surrendered to the general government, all which can be most advantageously exercised by the states themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of the state, and those which respect turnpike roads, ferries, &c., are component parts of this mass." And he proceeds to say: "No direct general power over these objects is granted to congress, and consequently they remain subject to state legislation. If the legislative power of the union can reach them, it must be for national purposes, it must be where the power is expressly given for a special purpose, or is clearly incidental to some

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power expressly given." The proposition is then advanced, that although the power to enact quarantine and health laws for the proper object, be in the states, such laws may be controlled by congress so far as it may be necessary to control them, for the regulation of commerce. And so, while the regulation of pilots is said to be within the power to regulate commerce, conferred upon congress, it is also admitted that the acknowledged power of a state to regulate its police, its domestic trade, and to govern its own citizens, may enable it to legislate on this subject to a considerable extent. And in a previous part of the opinion, a general principle of discrimination between the powers conferred upon the government of the union, and those retained by the states, is stated in the following terms: "The genius and character of the whole government seem to be that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the states generally; but not to those which are completely within a particular state, which do not affect other states, and with which it is not necessary to interfere for the purpose of exercising some of the general powers of the government." And upon the question whether the power of congress to regulate commerce among the states, stops at the jurisdictional lines of the several states, he asks the significant question, "Can a trading expedition between two adjoining states, commence and terminate outside of each?"

From these general propositions, which, without going into the details of the subject, yet cover the whole ground, it is clearly deducible, that although the commercial power granted to congress may have been considered as embracing the entire subject, and every part of the subject, of commerce between or among the states, there yet remained in the states power over many subjects connected with that commerce, and the regulation of which, by the states, though it might incidentally, and in a greater or less degree, affect that commerce, must prevail until con-

gress, under its comprehensive power, to be exerted for national purposes, should make a different regulation of the same subject. Without attempting to trace these principles through the various decisions of the supreme court, in which they have been involved, it is deemed sufficient to notice two only, viz: that of *Wilson vs. The Blackbird Creek Mursh Company*, 2 *Peters*, 250, and that of *Cooly vs. The Board of Wardens of Philadelphia*, 12 *Howard*, 311, decided in 1851. In the first of these cases the question was, whether an act of the state of Delaware, authorizing the construction of a dam across Blackbird creek, was constitutional. The tide had ebbcd and flowed in the creek higher up than the place where the dam was erected. The dam stopped a navigable creek, and abridged the rights of those who had been accustomed to use it. But the court uses the following language: "The value of the property on its banks must be improved by excluding the water from the marsh, and the health of the inhabitants probably improved. Measures calculated to produce these objects, provided they do not come in collision with the powers of the general government, are undoubtedly within those which are reserved to the states." And while it is said that if congress had passed any act in execution of its power to regulate commerce, the object of which was to control state legislation over these small navigable creeks, the state law conflicting with it would be void, it was decided that, as congress had passed no such law, its power to regulate commerce had not been so exercised as to affect the question of the repugnancy of the law of Delaware to the power of regulating commerce conferred by the constitution.

In the other case referred to, (12 *Howard*, 318.) the question whether the grant to congress of the power to regulate commerce, did, *per se*, deprive the states of all power to regulate pilots, is expressly discussed and decided. And on the ground that it is not the mere existence of the power over commerce, but its exercise by congress, which may be incompatible with

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4. The power of Congress to regulate commerce between the States, does not interfere with the right of the States to legislate on questions which concern its own par

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ticular interests
and those of its
citizens, as in
ferries, &c.,
where Congress
has not legislat-
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ard, 318.)

the exercise of the same power by the states, which, therefore, may legislate in the absence of congressional regulations, and on the ground that this power embraced not only a vast number, but a great variety of subjects, some requiring a uniform rule, and others, like that of pilots, demanding a diversity of regulation, to meet the local necessities of navigation; and in view of the legislation of congress on the particular subject, it was decided by a majority of the court, 1st. That the mere grant of the commercial power to congress, did not deprive the states of the power to regulate pilots; and, 2d. That, although congress had legislated upon the subject, its legislation manifests the intention, with a single exception, not to regulate this subject, but to leave its regulation to the several states.

If, then, it be true, that the power of congress to regulate commerce among the states, may extend to the regulation of ferries from the state on one side, to that on the other side of an intervening river, and that the conflicting state laws must yield to such an exercise of the power, it must be admitted that the subject is obviously and peculiarly one of that character which demands such regulation as will meet the local necessities and convenience. And that whether tested by the principle of the case referred to in *2d Peters*, or of that in *12th Howard*, or by the more general principles of the case of *Gibbons vs. Ogden*, it is one of those subjects over which the power of the states, exercised, as it has been, from the beginning, must prevail until the subject is regulated by congress, and except so far as it is so regulated. If the subject of ferries be, to any extent, embraced in the power granted to congress, as to which we do not in this case deem it necessary to inquire, it is certainly one of those contemplated by the opinion of the court in the case of *Gibbons vs. Ogden*, which can be most advantageously regulated by the states, and over which, no direct power being conferred by congress, if the legislative power of the union can reach

5. The power of the States to regulate ferries, and grant ferry privileges to their own citizens, where a navigable stream divides two States, cannot be questioned; at least unless Congress shall legislate upon the particular question.

them at all, it can only be for national purposes, and under a power expressly given for a particular purpose, or clearly incidental to some power expressly given.

Then the real question in this part of the case is, whether Congress has, to any extent, regulated ferries across the Ohio or any other river, from state to state, and how far, if to any extent, it has regulated or attempted to regulate them? The act of 1838, above referred to, is in its descriptive terms of the vessels to which its requisitions of a license and its penalty for navigating without one, apply sufficiently comprehensive to embrace all vessels propelled by steam. But the requisition of the first section, that the owners shall make a new enrollment of the same, under the existing laws, and take out a license, under the conditions now imposed by law, and which shall be imposed by the act itself, seem to imply, that only such vessels as might be required to be enrolled under previous laws, were intended to be embraced in the act. And on this ground, and because the requisitions of the previous laws, referred to, and especially of the act of 1793, were not deemed applicable to ferry boats, making many trips each day, across a narrow river, Judge Catron, a judge of the supreme court, presiding in the circuit court for Kentucky, in an opinion, of which a manuscript copy is before us, decided that a steam ferry-boat, used for ferrying across the Ohio river, was not intended to be embraced by the act, and that the penalty which it imposes for not having obtained a license, could not be enforced against the owners of such boat. It may be added, as confirmatory of this view of the act of 1838, that some of its own provisions for the safety of passengers, would seem to be applicable to longer voyages, and scarcely necessary in reference to the short and frequent trips of a ferry-boat. The title of the act also indicates what is notorious in the history of the times, that this action of Congress embracing steam vessels navigating

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6. The act of Congress of 1793 and 1838, or 1852, requiring steamboats to obtain license, &c., does not apply to ferry boats. No intention has been manifested by Congress to assume the control of ferries, or the legislation of the States on that subject.

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our western rivers, was especially induced by the many disasters, involving to a frightful extent the loss of life or limb, which had occurred in the longer voyages up and down the rivers, and it was to afford better security against such disasters, arising as they did, from the insufficiency of the boat, or its engine, or equipments and officers, that the inspection, enrollment, and licensing of steam vessels were required, and other provisions made, for the same purpose.

But if it were conceded that this act, so far as it provides for the safety of passengers, from the dangers of steam, and of fire necessary for its generation, should be deemed applicable to all steamboats, whether used for ferrying or for other purposes, it would not follow that Congress intended by this act, to assume the general regulation of ferries, transporting persons and property from state to state, or to regulate their establishment and rights or duties, or to interfere with those already established by the states, any further than to require the inspection, enrollment, and license for which it provides. To say nothing else, the absence of all provision for securing the speedy and regular transportation of persons and property across any river, and for meeting the requirements of travel and trade, in passing from one to the other side, shows conclusively that Congress did not intend, in passing this act, to assume the office of regulating ferries, which had so long been safely and beneficially exercised by the states. If the license required by this act authorizes the owners of the licensed boat to transport persons and property across a river, whenever and wherever, and on such terms as they choose, it authorizes them to violate the rights of individuals; to invade and contemn the jurisdiction and power of the state, and to destroy or impair the efficacy of establishments created and made suitable to meet the exigencies of trade and intercourse between the states, without imposing the plainest and most essential requisitions

for carrying on that commerce, under color of regulating which, the authority must be supposed to have been granted. We cannot concede that any such authority was intended to be given, nor can we concede that if given in the manner and under the circumstances stated, it would be valid for the purposes claimed.

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But in addition to the considerations just mentioned, and to others before noticed, which must have an important bearing, not only upon the question of the extent of the power conferred on Congress, or remaining in the states, but also upon the construction of the acts of Congress in the execution of its power, the act of 1852, entitled, "an act to amend an act, entitled, an act to provide for the better security of the lives of passengers, on board of vessels propelled by steam, and for other purposes," affords, as we think, conclusive confirmation, if confirmation were necessary, of the opinion that the act of 1838, so far from being intended to regulate ferries, or to authorize any interference with them, under color of the license which it provides for, was, probably, not even intended to apply to steamboats engaged in the business of ferrying. The act of 1852 embraces in substance, the provisions of the previous act, with additional details and requisitions, carried out with great minuteness and precision, and enforced by numerous penalties. It commences by declaring that no license or enrollment shall be granted, under this or the former act, to any vessel propelled, &c., until satisfactory evidence shall be produced, that all the provisions of this act have been complied with; and for non-compliance, the owners and vessel are subjected to the penalties contained in the second section of the former act. As the provisions of this act seem to continue and extend, or enlarge all the provisions of the act of 1838, there seems to be no part of that left in actual force and operation. Then the 42d section of this act of 1852, expressly declares that it shall not apply to steamers used as ferry-boats.

7. A steam ferry boat acting under a license obtained under the act of Congress on this subject, had no right in virtue of such license, to interfere with the ferry privileges of the appellees, held under the State authority.

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And the 44th section expressly repeals all parts of laws therefore made, which are suspended by, or are inconsistent with this act. This act, then, which covers the whole subject, referring only to the penalties of the act of 1838, for non-compliance with the provisions of the act of 1852, is considered as superceding and in effect repealing the act of 1838. And if it is not to have this technical effect, it shows, at least, when taken, as it should be, in connection with the previous act, that it was not intended that either should apply to steamers used as ferry-boats. And the fact that in 1838, steam ferries were little used, may account for the failure to exclude them from that act. It was certainly not intended by the last act, that any steamer should be licensed merely upon compliance with the provisions of the first, for this would be directly inconsistent with the first section. And as the last act does not apply to steam ferry-boats, there is no authority for licensing such a vessel under either act. It would be very strange, then, and as we think, inadmissible, to suppose that while no license can be granted to a steam ferry-boat, under the laws relating particularly to vessels propelled by steam, such a license could be granted under laws for regulating the coasting trade, passed before steam vessels were in use, and which, at any rate, make no particular reference to them. The act of 1838 requires a new enrollment of steam vessels, under then existing laws, and a new license under the conditions imposed by those laws, and by that act. The act of 1852 prohibits any enrollment or license of steam vessels, but upon terms prescribed by that act, which terms had not been required by any previous act, and do not apply to steam ferry-boats. The Commodore appears to have been inspected, enrolled, and licensed in 1854. Whether her owners complied with the act of 1852, it is not deemed material to inquire. If they did not, we suppose her license, being obtained in violation of law, is of no avail. If they did, her license to be

employed in carrying on the coasting trade, under the laws regulating that trade, which, so far as we can discover, never have been understood to confer the right, ferrying, properly so called, did not, in our opinion, confer upon her or her owners the right of transporting persons and property, as a ferry-boat, between Newport and Cincinnati, to the disturbance of the ferry established there, and to the injury of those entitled to it.

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This opinion having been already extended to an unusual length, we shall limit our third inquiry to as brief a space as practicable. The facts relating to the Esplanade and the entire space between the lots in the town of Newport and the Ohio river, have been substantially presented in our preliminary statement, and in the statement made of the claims and pleadings of the parties. The location of the town, the plat made in 1791 or 1792, presenting an open space between the front street and the river, and the re-survey and new plat made in August, 1795, having words written on the open space, indicating its appropriation to the public, together with the sales of lots made under both, before the passage of the act of 1795, are circumstances which, according to the repeated decisions of this court, would, in the absence of proof to the contrary, suffice to establish a valid dedication of that space, for all the public uses to which it was appropriate. The reasons given by Hubbard Taylor, the agent of the proprietor, for not laying out that space into streets and alleys, not having been, so far as appears, communicated to the public, or to the purchasers of lots, could not repel the presumptions arising on the face of the plat. And although, before the second plat was made, the established ferry might be sufficient to show that the right of ferry was intended to be reserved, there was nothing on that plat to show that anything else was reserved. The claim of the ferry right from the time of its establishment, may have been acquiesced in by the few persons interested, in

8. A plan of a town laid out upon a navigable river, with a space shown upon the plat between the lots and the river, indicating its appropriation to public use; and a sale of lots under such a plat, are circumstances which in the absence of contradictory evidence which show a dedication of such space to public use. Though the establishment by the proprietor of a ferry upon that space would be sufficient to show a reservation of his right, to the extent of the uninterrupted and exclusive use for that purpose. And after an acquiescence in such claim for more than thirty years, can not be questioned. (8 B. Monroë, 258.)

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consideration of the advantage of having a ferry, to which no other individual but the original proprietor was entitled. The ferry right was, doubtless, the principal object of the reservation, made in the 7th section of the act of 1795. And although there may have been no precise notion on any side, of the uses of the space next to the river, declared to be for a common, the visible ferry carried on by the proprietor, must have apprized all concerned, that the ferry right was intended to be reserved. The acquiescence in the act thus understood, and in the right of ferrying claimed and exercised under it, is sufficient, not only to establish the presumption of consent at the time, and perhaps of an original reservation, but to establish the right itself, as against the town. And as during the entire period, the ferry has been carried on by the Taylors, under claim of title, for their own exclusive profit, without the recognition of any right or interest in the town, to the proceeds or any share of them, and, so far as appears, without even a claim of that sort on the part of the town, we are of opinion, that by the lapse of time alone, if there be no other ground, all claim on the part of the city of Newport, not only to the legal right to the existing ferry, but to the beneficial interest in its proceeds and profits, is barred and extinguished, if it ever existed.

9. The dedication of land by a proprietor, of lands laid out as a town, on a navigable river, to be a common, confers the right on the public authorities of the town to build wharfs and charge wharfage.

With respect to the title and uses of the Esplanade and entire river front, we should be inclined to the opinion, if it were not for the former decisions on the question, between the same parties or their predecessors, in whose place they stand, that the legal title was vested by the act of 1795, in the trustees, for the general uses of the town and the public, except as to the ferry. But this court having given a different construction to the act, in the first contest between Taylor and the town of Newport; and in the renewed contest of 1850, the court, though differently constituted, having regarded that construction as binding upon it, we should not feel at liberty,

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upon the same question between the same parties, to depart from a construction thus doubly sanctioned, nor should we do so upon any question to which it was directly applicable, but upon grounds of absolute certainty and conviction. It will be recollected, however, that in the cases referred to, nothing was in contest but the right of ferry, and that which was essential to it, and the only point really decided, was, that the town and city of Newport had no such title or interest in the open slip on the river, as carried with it the right of ferry, or authorized the grant of a ferry to her. The question, whether the legal title was in the town or in Taylor, may have been necessarily decided. But the question, what other rights, exclusive of the legal title and of the right of ferry, the town and city were entitled to, either under the original dedication, or under the declaration made in the 7th section of the act of 1795, was not before the court for decision, nor necessary to the determination of any point actually presented. The court, it is true, in the first of the cases referred to, not only decided that the title to the slip in question, was not in the town or its trustees, and consequently remained in Taylor, and that the right of ferry from the town, was reserved to Taylor by the act, and that the title and ferry right had passed to James Taylor of Kentucky; but also restricted the rights of the town in the open slip on the river, to a mere right of common, which, though not defined, is understood to have been used in its technical sense, and declared that the reservation to Taylor included all rights not incompatible with the right of common, spoken of in the opinion, as the commonable right of the town. But the only question was, whether the town had such right or interest in the land, as was requisite to entitle it to the grant of a ferry. And the conclusive adjudication, that such right was not in the town, but was reserved to Taylor, might still leave in the town all other rights and uses, not incompatible with the reservation of the right of ferry in front of the town,

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and which might still be properly claimed, under the dedication of the slip, whether by the plat or by statute, as a common for the town.

It was decided, in the case of *Rowan's executor vs. Portland, 8 B. Monroe, 258*, that the ferry right which in that case had been granted to the proprietor of the town, and was in use before the dedication, though attached to a portion of the slip which had been dedicated, was not essential to the public uses of the dedication, and did not necessarily pass, by implication, as a part of it, but was impliedly reserved to the proprietor. And yet, in that case all other appropriate uses of the slip, for the purposes of the town and the public, and among them the right of constructing wharves and charging wharfage, were decided to have passed by the dedication. The right of ferry from the slip now in question, or from any convenient part of it, might have been reserved to Taylor, and yet all other rights and uses, not inconsistent with, nor necessary to sustain it, might have been dedicated, either by the plat and sale of lots, or by the statute establishing the town. In the original plat, the dedication was not indicated, and therefore neither restricted nor enlarged, by any written word. The second plat, and the statute founded on and referring to it, calls it a common, or an Esplanade, to remain a common forever. Was the Esplanade to be a common of pasture, a common of piscary, or a common of turbary? Was the Esplanade, one-half of which, or more, was the sterile shore and bank of the river, dedicated forever to this restricted use of a town situated on the bank of a noble river, and seeking and expecting the advantages of that situation? And was not the word "common" understood, and to be understood, not in its technical sense, as being a right or profit which one man may have in the land of another, but in its popular sense, "as a piece of ground left open for common and public use, for the convenience and accommodation of the inhabitants of the town. It was

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understood in this latter sense by the supreme court of the United States, in the case of *Cincinnati vs. White's lessee*, 6 *Peters*, 435, and by this court, in the case before referred to, of *Rowan's executor vs. Portland*, and in *Giltner vs. Trustees of Carrollton*, 7 *Ben. Monroe*, 680, and *Kennedy's heirs vs. Covington*, 8 *Dana*, 61. In which cases, and in others referred to therein, and in *Fox vs. Town of Dover*, 9 *B. Monroe*, 200, and *Alves vs. Town of Henderson*, decided at the last term, the doctrine generally applied by this court to the question of dedication in the establishment of towns, is to be found. Then not feeling ourselves bound by the interpretation heretofore given by this court to the word "common," as used in the plat, and in the act of 1795, except so far as that interpretation may be necessary to explain or to sustain the decision as to the ferry right, we are of opinion that the dedication of the slip of ground in question, as a common, by the plat of 1795, and by the act establishing the town, was a dedication of it as public ground, for the convenience and accommodation of the town and the public, and for such appropriate uses, exclusive of the ferry right in Taylor, and not inconsistent with it, as are to be implied in the dedication of a narrow slip of open ground between the lots and a navigable river, which include the right of constructing wharves and charging wharfage, which has never before been in contest between these parties. It is scarcely necessary to say that, in our opinion, the reservation to Taylor confers no new right not already existing in him, either because it had not been parted with, or because it had been expressly, or tacitly, retroceded by those who might have been entitled to it.

That the few inhabitants and lot owners might have tacitly conceded such right of ferry, (if there was any,) as they may have been entitled to under the original dedication, if it is not to be implied from the act of 1795, which must have been understood as reserving that right, is to be conclusively implied from

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the general acquiescence in the reservation of the right by that act, and from its exercise under claim of right, and without dispute or counter claim, for more than thirty years, and is regarded as conclusively established by the decisions of this court, and by its continued exercise to the present time. On the other hand, the evidence establishes the fact, that for all appropriate public purposes, except those pertaining to the ferry, and the right of ferry, the slip in question, though Taylor may have claimed the legal title since 1799, has been used by the town, and its inhabitants, and the public, without disturbance, with scarcely the shadow of a counter claim, and with the general acquiescence of Taylor, and those claiming under him, from the earliest history of the town. And this user, the particulars of which have been before stated, we consider not only as sufficient to sustain the public right under the dedication, but as being in itself sufficient to establish a dedication. As against James Taylor, the patentee, and his heirs, it might be assumed that the legal title passed to James Taylor, his son, if not by the deed of 1799, by long user and claim of the ferry right as transferred by the deed of 1799, and at least to the extent necessary to sustain that right. But in whomever it may have been, and to whatever extent it was held to his use, so far as the ferry right was concerned, and beyond that, to the uses of the dedication.

10. A license under the United States to a coasting vessel, confers no right to transport passengers from one side to the other of the Ohio as a ferry boat, and no authority to transport passengers from the Kentucky to the Ohio side of the river Ohio, without a license

It follows from these views, that in our opinion there was no error in dismissing the claim of the complainants to an account of wharfage, and the counter claim of the city of Newport to an account of the profits of the ferry. Nor do we perceive any error in the refusal to decree a conveyance of the Esplanade, or any part of the slip, to the city, because if the legal title be in the complainants, or either of them, the unqualified conveyance prayed for might impair the ferry right, to which the city is not entitled, and a qualified conveyance is neither called for, nor necessary to the enjoyment of her

rights; and because, more especially, if James Taylor, the testator, had the legal title to any extent, or farther than was necessary to sustain the ferry right, the parties by whom it could be conveyed are not before the court. And to this extent the judgment is affirmed on the original and cross appeal. But the judgment is erroneous in the extent to which it perpetuates the injunction, and to which it restrains the Commodore, and the defendants, in landing upon the slip in question, persons and property transported from the Ohio shore; and in adjudging, as it seems to do, the exclusive right of ferrying, from both sides of the river, to be in the plaintiffs alone. The transportation, as carried on, was illegal, and properly enjoined, and the injunction should have been perpetuated against future transportation of a like kind, either under color of any license obtained, or to be obtained, from the authorities of the United States, under the existing laws, or without such license, unless authorized to transport from the Ohio shore, from a ferry established on that side under the laws of that state, and they might have been restrained or prohibited, under all or any circumstances, from transporting persons or property from this to the other side, within the interdicted distance above or below an established ferry on this side, unless authorized under the laws of this state to do so; and the exclusive right of ferrying from the Kentucky side, should have been declared to be in the plaintiffs.

Wherefore, the judgment perpetuating said injunction, and adjudging the exclusive right of ferrying from both sides of the river to be in the plaintiffs, is reversed, and the cause as to that is remanded, with directions to perpetuate the injunction to the extent just indicated, and to adjudge the right as above directed.

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APPEALS.

1. When an appeal or writ of error is dismissed, whether by the party prosecuting it or by the court, the whole case is out of court, and no decision can be had upon the cross errors of the appellee or defendant in error. (3 *Statute Law*, 35.) Query: *What would be the effect of dismissing an appeal after a cross appeal. Crawford's adm'r vs. Bashford*, 3.
2. No appeal is authorized in controversies between the Henderson and Nashville Railroad company and individuals, unless the appeal be prayed at the time of rendering the judgment, and an appeal bond entered into within the time allowed by the court for that purpose. (*Acts of 1850-1*, page 281.) *Henderson and Nashville R. R. Co. vs. Dickerson*, 301.
3. Appeals from judgments of the circuit court in cases of misdemeanors, must be taken at the term at which the judgment is rendered. (*Crim. Code*, sec. 343.) *Com'th vs. Adams*, 339.
4. The record must be filed in the clerk's office of the court of appeals, within sixty days after the judgment. No summons is necessary. *Commonwealth vs. Adams*, 339.

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APPOINTMENTS.

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ASSIGNOR AND ASSIGNEE.

1. If the assignor be party to the suit, in favor of the assignee against the obligor, he is bound by the decision, and cannot controvert it in a suit by the assignee against him, to recover the amount paid for the assignment. *Ellis vs. Threlkeld*, 344.
2. Any holder of a bill with indorsement in blank, who receives it in good faith for a valuable consideration, is authorized to receive the amount, though it may have been lost, stolen, or fraudulently misapplied. (*Story on Prom. Notes*, 148; *Same on Bills*, 207; *Chitty on Bills*, 277.) The rule caveat emptor does not apply to those purchasing such notes. *Carruth, &c. vs. Thompson, &c.*, 575.
3. A delivery of a note indorsed in blank, vests the holder with the right to receive the money thereon—to negotiate and fill up the assignment in general terms. (*Cope vs. Daniel*, 7 *Dana*, 416.) So, if the delivery be by an agent of the owner. (*Story on Prom. Notes*, 150; *Bayley on Bills*, 123-4.) *Carruth, &c. vs. Thompson, &c.*, 575.

BONDS—STATUTORY.

Boyd sued out an attachment against Bruce, and placed it in the hands of the Sheriff. Bruce tendered to the sheriff his bond to abide and perform the judgment of the court, with Hanley as security. The sheriff not being willing to take the surety, Bruce procured Cook to sign the bond also. Hanley was released on *non est factum*. Held, that though the attachment had not been levied, the bond was binding on Cook as a common law bond. *Cook vs. Boyd*, 557.

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CODE OF PRACTICE.

1. The 93d section of the Code of Practice has no application to a case of an attachment, sued out in one county, where defendant is served with process, and seeking the sale of land in another county, but such proceeding is governed by the 106th section, which authorizes the action to be brought in any county where the defendant resides, or is served with process. *Nixon vs. Jack & Co.*, 179.

2. By section 474, a judgment creditor having an execution returned "no property found," may institute equitable proceeding, in the court from whence the execution issued, or in the court of any county in which the defendant resides or is summoned. *Nixon vs. Jack & Co.*, 181.

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COMMON CARRIERS.

1. Steamboat owners are regarded and held to the responsibilities of common carriers, but are not responsible to passengers for the loss of their wearing-apparel, which they carry about their person, and not delivered to the officers of the boat as baggage for safe keeping. *Steamboat Crystal Palace vs. Vanderpool*, 308.

2. By the common law, the common carrier was, in effect, an insurer against all loss, except loss by the act of God, or the king's public enemies, and jettison was not justifiable, unless rendered necessary by one of these causes. Subsequently, an exception was introduced into the contract by carriers on sea, of the "dangers or perils of the sea," which denote natural accidents peculiar to that element, which do not happen by the intervention of man, nor are to be prevented by human prudence. (3 *Kent's Com.*, 216, 217.) The peril must appear to have occurred without fault. *Bentley vs. Bustard*, 677.

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CONSTITUTIONAL LAW.

1. Congress has power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes." (Art. 1, sec. 8.) The appointment of pilots is a regulation of commerce, (19 *Howard's Rep.*, 316,) but the States may legislate upon the subject where Congress has not done so. *Dryden vs. Commonwealth*, 602.

2. The act of Congress of 1793 and 1838 or 1852, requiring steamboats to obtain license, &c., does not apply to ferry boats. No intention has been manifested by Congress, to assume the control of ferries, or the legislation of the states on that subject. *Newport, &c. vs. Taylor's Ex'rs*, 799.

CONSTITUTIONAL LAW—Continued.

3. The power of Congress to regulate commerce between the states, does not interfere with the right of the states to legislate on questions which concern its own particular interests, and those of its citizens, as in ferries, &c., where Congress has not legislated. (12 *Howard*, 318.) *Newport, &c. vs. Taylor's Ex'ors*, 797.
4. The power of the states to regulate ferries, and grant ferry privileges to their own citizens, where a navigable stream divides two States, cannot be questioned, at least, unless Congress shall legislate upon the particular question. *Newport, &c. vs. Taylor's Ex'ors*, 798.

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CONTRACTS.

1. Where one undertakes to perform a contract of a specific character, in services upon which, he is to receive a fixed compensation, he cannot claim such fixed compensation under the contract until performance, unless prevented by the other party to the contract, without cause, in which event the party is entitled to a rateable compensation, according to the terms of the contract, but if the other party have just cause for obstructing performance of the condition precedent, nothing can be claimed for the part performance, but a reasonable compensation commensurate with the service rendered. *Foster vs. Watson*, 384.
2. Though a party may have failed to fulfill a contract, by the performance of service which would entitle him to a fixed compensation, if he has performed service for the benefit of the other party, he may be entitled to compensation for the value of such services. *Foster vs. Watson*, 386.
3. Contracts are to be construed according to the real intent and understanding of the parties, primarily, by the words which they have used, with the aid, if necessary, of such other considerations as may show the sense in which the party intended to be understood. *Montgomery, &c. vs. Fireman's Insurance Company*, 439.
4. Contracts are to be construed according to the intention of the parties thereto. A contract to sell 40,000 hams to be paid for on delivery. The hams were inspected and invoiced, but not delivered or paid for. Held, that the contract was executory, and property not changed; and if insured, protected by the policy. (*Phillips on Insurance*, 1 vol. 21; 4 *Massachusetts Reports*, 336.) *Aetna Insurance Company vs. Jackson, Owsley & Co., and Jackson, Owsley & Co. vs. Aetna Insurance Company*, 267.
5. A vendor of personal property, to be paid for on delivery, parts not with the title until payment. If the price is not paid in a reasonable time, he may resume his original ownership, as upon a rescission of the contract. (*Story on Contracts*, sec. 809; *Chitty on Contracts*, 427, and authorities there cited.) *Aetna Insurance Company vs. Jackson, Owsley & Co., and Jackson, Owsley & Co. vs. Aetna Insurance Company*, 268.
6. There must be an offer of performance of a marriage contract, before any action can be maintained for a breach of promise to marry. (*Fible vs. Caplinger*, 13 *B. Monroe*, 384; *Burke vs. Shaine*, 2 *Bibb*, 341.) *Burnham vs. Cornwall*, 288.
7. The absence of any stipulation in a note given for the hire of a slave, as to the business about which the slave is to be employed, leaves that fact open to the introduction of parol proof, to show how the slave was to be employed. (*Jeffrey vs. Walton*, 1 *Starkie's Rep.*, 267.) *Western vs. Pollard*, 320.

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CONVEYANCES.

See *Deeds*.

CORPORATIONS.

1. The question whether an incorporated company has been regularly organized, cannot be inquired into collaterally. It must be by a direct proceeding. (5 *Litt.*, 45; 9 *B. Monroe*, 71.) *Wight vs. Shelby R. R. Co.*, 5.
2. A subscription for stock in a railroad company, is not invalid by the failure of the subscriber to pay a small sum upon each share, when subscribing; it was his duty to pay it; if he failed, it was a failure of duty, and he cannot take advantage of his own wrong. *Id.*
3. The corporation of the city of Louisville is not responsible for injuries done to private property by a mob. (*Prather vs. City of Lexington*, 13 *B. Monroe*, 559.) *Ward vs. Louisville*, 193.

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See *Elections*.

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CRIMINAL CAUSES.

The only ground upon which the court of appeals can arrest a judgment in a criminal case, is that the facts stated in the indictment do not constitute a public offense within the jurisdiction of the court. (*Crim. Code*, sec. 270.) The Criminal Code, giving the right of peremptory challenge in criminal cases to the commonwealth, applies as well to prosecutions commenced before, as to those commenced after, the first day of September, 1854. This is not an *ex post facto* law. (3 *Dallas*, 386; 12 *Wheat.*, 480; 3 *Grattan*, 632.) The words *ex post facto* have relation to *crimes*, and not to *proceeding* in criminal cases. *Walston vs. Commonwealth*, 34.

COUNTER-CLAIM.

See *Practice in Circuit Court*.

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DEEDS.

1. Deeds should be construed by considering all the parts thereof, and see that they harmonize. *Spurrier's heirs vs. Parker, &c.*, 280.
2. It is not proper to resort to extraneous facts, and surrounding circumstances, in the construction of writings, where the language used is susceptible of a clear solution. *Spurrier's heirs vs. Parker, &c.*, 284.

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DEEDS OF TRUST.

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DEDICATION.

1. A portion of the grantees of the company, to whom the grant was made, called Henderson's grant, (see 3 *Littell's Laws of Kentucky*, 585,) by an ordinance set apart a portion of the grant for the town of Henderson, by a plan set forth in a plat, in which public grounds, streets, alleys were laid down. Held, that the public grounds, streets, alleys, and the space between the lots and the Ohio were dedicated to public use. *Alves vs. the Town of Henderson*, 168.
2. It is not competent for the citizens of a town, by deed, to transfer to an individual the title to, or exclusive use of the streets, alleys, and public grounds dedicated to the use of the public. *Alves vs. the Town of Henderson*, 170.

DEDICATION—Continued.

3. A citizen of a town by inclosing and holding adversely for twenty years, may acquire exclusive right to a portion of the public grounds dedicated to public use, but the possession and use must be adverse and the use exclusive. *Aloes vs. the Town of Henderson*, 171.
4. The dedication of lands laid out for a town by the proprietor on a navigable river as a common, confers on the public authorities of the town the right to construct thereon a wharf and charge wharfage. *Newport. &c. vs. Taylor's Ex'rs*, 804.
5. A plan of a town laid out on a navigable river, with a space shown on the plat between the lots and the river, indicating its appropriation to public use, and a sale of lots under such a plat are circumstances, which in absence of contradictory evidence show a dedication of such space to public use. Though existence of an established ferry upon such space, would be sufficient to show a reservation of the ferry right, and after an acquiescence in such right for thirty years, it cannot be disturbed. (*U B. Monroe*, 258.) *Ib.*, 803.

See *Franchises*.

See *Ferries*.

DESCENTS.

See *Wills*.

See *Devises*.

DETINUE.

See *Practice in Circuit Court*.

DIVORCE.

See *Evidence*.

DOWER.

1. The widow of a husband who holds a title bond to land, but who disposes of it during the coverture, is not entitled to dower in the land, though the husband may receive a conveyance of the legal title after he has parted with the title bond—he held the legal title in trust for his assignee. *Heed and Wife vs. Ford*, &c., 117.
2. Where the husband conveys land during the coverture, the widow suing for dower is not entitled to rents, even from the time of commencing her suit. (*Webber vs. Burgess*, MSS. opinion of June term, 1855; 4 B. Monroe, 368.) *Hill vs. Golden*, 554.
3. The proper criterion of recovery against the heirs of a grantor upon a covenant of warranty, when there is a recovery of dower “is that proportion of one third of the consideration paid for the land, which the value of the life estate in the allotment made, bears to the value of an estate made therein. *Hill vs. Golden*, and *Hill's heirs vs. Same*, 554.
4. The claim of a grantee against the heirs of a grantor upon a covenant of warranty, is not a valid defense by way of counter claim to a claim of dower by the widow of the grantor under the 126th section of the Code of Practice. *Hill vs. Golden*, and *Hill's heirs vs. Same*, 554.

See *Femes Covert*.

DEVISES.

1. A devise was made to slaves who could not take, and a devise over to others in case the first devisees die without issue. Held, that the first devisees being incapable of taking, being slaves, that the devise over was void, and that the heir-at law must take. *Delphia Jackson, (of color,) vs. Collins*, 221.
2. The bastard child of a free person of color is heir to the mother. *Delphia Jackson, (of color,) vs. Collins*, 221.

DEVISES—Continued.

3. In case there be an executory devise to take effect upon the death of a particular person without issue, the ulterior devise having no connection with, or dependence upon the previous interest, but depending upon a contingency, which may or may not terminate a previous interest created by the will. Held, that the executory devise could not take effect until the contingency occur, though the first interest could not take effect because of the incapacity of the devisee to take; and that the heir-at-law should take. *Delphia Jackson, (of color,) vs. Collins*, 223.

See *Wills*.

ELECTIONS.

Where the board, whose duty it is, decides that one chosen clerk of a county court by a majority of votes, is ineligible and cannot take the office, and that it is vacant, it is the duty of the county judge to appoint a clerk to serve until the succeeding August election. The former clerk has no right to hold the office. *Stephens vs. Wyatt*, 547.

EMANCIPATION.

1. The 10th article of the constitution of Kentucky, which took effect in June 1860, so far as it prescribed that laws should be passed to prevent the emancipation of slaves to remain in the state, was not effectual of itself, to prevent owners from emancipating their slaves, until the legislature passed laws to that effect, and a deed of emancipation executed after the constitution went into effect, before the passage of such act by the legislature, was valid under the provisions of the act of 1798. *Delphia Jackson (of color) vs. Collins*, 218.
2. The right to emancipate slaves not being taken away, by the present constitution until legislation under it, the right remained unaffected until legislation took place, and the right of the person emancipated to remain in the state was not affected, as the previous laws on that subject were not repealed by the constitution, but expressly continued in force. *Delphia Jackson, (of color) vs. Collins*, 219.
3. The present constitution of Kentucky which went into operation in June 1860, did not by its own force operate to prevent the unconditional emancipation of slaves, nor repeal any existing law giving that right. *Delphia Jackson (of color) vs. Collins*, 220.
4. The will making no provision for the expense of transportation of the slaves to Liberia, or requiring that it shall be at the expense of the colonization society, if there be no other fund a portion of the legacy is to be appropriated to that purpose, in consistency with the will, and the *Revised Statutes*, page 644. *Isaac, &c. vs. Graves' Executor*, 369.
5. The right to freedom on the part of the slaves being prospective, their hire, until their freedom is complete, is a part of the estate, and properly a fund for distribution, as the balance of the estate, and may properly, when they are devisees, be applied to defray the expenses of transportation, equally for the benefit of all; and the remaining parts paid to each adult on arriving in Liberia, or on their embarkation, and the parts of the infants so secured to them in Liberia that they receive it on arriving at full age. *Isaac, &c. vs. Graves' Executor*, 370.
6. The will contained this clause: "Each and every one of my slaves, are to be liberated, and placed in the hands of the Kentucky State Colonization Society, for the purpose of being colonized to Liberia." Held that in the foregoing clause there are no words of immediate emancipation, but the slaves are to be placed in the hands of the society for the purpose of being colonized to

EMANCIPATION—Continued.

(in) Liberia. The liberation and indicated disposition is for the single purpose of being colonized, and so connected with it as to be incapable of a separate and independent operation, without violating the intention of the testator. Their colonization, as far it depends upon the slaves, is a condition precedent to their emancipation. *Isaac and others (of color) vs. Graves' Executor*, 367.

7. A bequest to slaves, each of an equal share in one half the proceeds of the testator's estate, being illegal, can only be made effectual on their becoming free, and capable of taking as legatees, and none are entitled to freedom, or to the bequest made to them, who are not colonized. *Isaac, &c. vs. Graves' Executor*, 368.

EQUITABLE INTERESTS.

See *Partner and Partnership*.

EQUITY OF REDEMPTION.

See *Executions*, 1, 2.

ESCROW.

To make a writing valid as an escrow, it must be delivered to a third person, not to one of the parties to the instrument. *Wight vs. Shelby R. R. Co.*, 4.

EVIDENCE.

1. Parol evidence is not admissible to vary the term in a written subscription to a railroad, unless there be fraud or mistake in its execution. *Wight vs. Shelby Railroad Company*, 5.
2. The dying declarations of a person wounded, is clearly admissible evidence against the person giving the wound, according to the English law—not changed by the laws of Kentucky. (*Greenleaf on Evidence*, 186.) *Walston vs. Commonwealth*, 15.
3. But to render dying declarations admissible, they must be made *in extremis*, under a solemn sense of impending dissolution. In such a situation every motive to falsehood is supposed to be silenced, and every motive to truth in lively exercise. Its credibility is however to be decided by the jury. The rule of law admitting dying declarations to be given in evidence, is not changed by the constitution and laws of Kentucky. *Ib.*, 15.
4. The constitution of Kentucky did not change the rules of evidence which existed at its adoption, but it secures the right to the accused to confront the witnesses who may testify against him, to prove such matters as were, according to the settled principles of law, evidence against him. (*Woodside vs. State*, *Howard's Miss. Rep.*, 655; *Anthony vs. State*, 1 *Miss. Rep.*, 264.) *Ib.*, 34.
5. A bill was filed to set up a lost will, and the will partially established. Subsequently, other persons claiming to be heirs, and not parties to the first suit, filed their bill, contesting the will so established. Held, that upon the trial of the second suit, it was proper to admit as evidence the testimony found in the record of all such witnesses as were dead, or whose testimony could not be had, but not admissible to read from a bill of exceptions, the testimony of witnesses who were living and whose testimony could be procured, or who might be examined. (*Singleton vs. Singleton, &c.*, 8 *B. Monroe*, 368.) *Payne, &c. vs. Price, &c.*, 99.
6. A witness, though party to the suit, having no interest, however, in the questions in issue, held competent to testify. *Nixon vs. Jack & Co.*, 182.
7. In actions for breach of marriage contract, it is not indispensable that there be direct evidence of an express promise to marry. (*Chitty on Contracts*.) It may be evidenced by the unequivocal conduct of the parties, and by a general, yet

EVIDENCE—Continued.

- definite and reciprocal understanding between their friends and relations, evinced and corroborated by their actions, that a marriage was to take place.— (*Wightman vs. Coats*, 15 *Mass. Rep.*, 1; 5 *Shaw & Weston*, 144; 2 *Dow. & Clark*, 289; *Chitty on Contracts*, 536.) *Burnham vs. Cornwall*, 287.
8. It is not sufficient that there shall have been a course of attention on the part of the male evincing affection, but the jury must be satisfied that there was a serious promise, or offer of marriage, accepted as such. *Burnham vs. Cornwall*, 287.
 9. A justice is not bound to regard the statement of a slave apprehended as a runaway, as evidence, nor is it admitted that a justice is responsible for an error of judgment, in committing a slave as a runaway, where there is no malicious or improper design. *Bullitt vs. Clement*, 200.
 10. The fact that the hirer of a slave saw him in the performance of a particular kind of service, without objection, tended to show that said service was contemplated at the time of hiring. *Western vs. Pollard*, 322.
 11. One having an interest, both for plaintiff and defendant, but whose interest preponderates on one side, is not a competent witness for that party on whose side his interest is greatest; nor is his wife. The rule is general, almost, without exception, that a vendor is a competent witness for his vendee, but incompetent for a creditor of such vendor, who levies upon property to prove fraud in the transfer. *Smead, Collard & Hughes vs. Williamson*, 535.
 12. A plaintiff collected a part of a judgment recovered for assault and battery, which judgment was reversed, when the plaintiff gave his obligation and surety, to refund the amount collected, in case he should not recover that amount on a second trial. On the second trial the surety was offered as a witness, and objected to; objection sustained. Plaintiff offered other surety, objected to, and objection sustained. Money deposited to the extent of the liability of surety. Held, that his competency was thereby restored. *Fitzpatrick vs. Harris*, 564.
 13. In criminal cases the presumption is, that the accused is innocent, until he is proved guilty, but if insanity be relied on, as an excuse for a felony, it is necessary, to authorize an acquittal, that the jury be satisfied that the accused was insane, the law presuming all men to be sane until the contrary is shown. (*Law Lib.*, vol. 4, 42; 8 *Scott, N. R.*, 595; *Wharton's Crim. Law*, 91; 7 *Metcalf*, 500; 1 *Zabriskie's New Jersey Reports*.) *Graham vs. Com'th*, 593.
 14. The defendant in a suit for a loss by jettison, should, in his defense, be allowed the benefit of proving the fact of a consultation with the officers of the vessel, and of their opinions then expressed, with respect to the condition of the boat, and probable means of relief, as showing only that the jettison was deliberately made, and in view of the actual circumstances of the case, as understood by those best acquainted with them. These facts are not conclusive, however, as to the necessity of a jettison. *Bentley, &c. vs. Bustard*, 692.
 15. A pilot is a competent witness, to testify in behalf of the managers of a steam-boat, sued for loss by jettison, alledged to be unjustifiable. *Bentley, &c. vs. Bustard*, 696.

EXECUTIONS.

1. May be levied on equities of redemption held by heirs, issuing upon judgment against the heirs for the debts of the ancestor. *Brace, &c. vs. Shaw, &c.*, 78.
2. It is not necessary that a sheriff selling an equity of redemption in land should set out in his levy, and at the sale, state the amount of the mortgage liens upon the land. *Ib.*, 78.

EXECUTIONS—Continued.

3. That an execution did not call for interest on the debt when the judgment was for interest, held, not sufficient to render invalid a sale of land under the execution, when there was no suggestion that there was any other judgment between the same parties. *Ib.* 82.
4. A sheriff having two executions in behalf of the same plaintiff against the same defendant returned on each the sale of the same land. Held, that whether he in fact made two sales or one only, there was no irregularity of which the defendants could complain. *Ib.*, 84.
5. The pendency of a suit to foreclose a mortgage, presents no objection to a sale of the equity of redemption under execution at the instance of another creditor than the mortgagee, and for another debt than that secured by the mortgage. *Ib.*, 85.

EXECUTORS.

An executor is bound to pay to distributees a debt which he owed the testator, and is not entitled to any commission for distributing such fund. *Worsley's Ex. vs. Worsley*, 472.

EXECUTORS AND ADMINISTRATORS.

See *Executors*.

FEMES COVERT.

1. The separate property of a married woman is liable for debts which she may contract upon the faith of that property, and the husband cannot interpose any obstacle to the collection of those debts, especially after, permitting the wife to trade with others, and deal with the property as if she was unmarried. *Lillard vs. Turner*, &c., 375.
2. Courts of equity will subject the separate property of a *feme covert* to the debts which she may create; and the execution of notes is sufficient evidence of her intention to charge her separate estate with the payment of the debts for which she executes her notes. (7 *B. Monroe*, 293; 13 *Ib.* 384.) *Lillard vs. Turner*, &c., 376.
3. A separate estate in a married woman confers upon her the power to deal with it as a *feme sole*. The right which she acquires in property under the operation of the statute to protect the rights of married women confers no such power. (12 *B. Monroe*, 329.) The two estates are different. The one can be rendered liable for debts by the separate act of the wife; the other only in the way designated by the statute. *Lillard vs. Turner*, 376.
4. The husband made a deed to a trustee for the benefit of his wife, and afterwards made his will, the provisions of which were renounced by the widow. Held, that as there was no provision in the deed showing that the wife was to have no more of the estate of her husband than as provided for her by the deed, that she could renounce the provision of the will, and claim, in additions to the property deeded to her trustee, her distributive share of the estate—there being no issue of the marriage, is one half. *Worsley's Ex'rs vs. Worsley*, 470.
5. Slaves acquired by the wife since the passage of the act of February, 1846, are not liable for the debts of the husband, and the husband's possession of them for five years will not render them liable for his debts. *Wheeler, &c., vs. Jennings*, &c., 480.
6. The act of 1846 does not require a gift of slaves to a *feme covert* to be evidenced by deed of record. A verbal gift is as effectual as a deed of record. *Wheeler, &c. vs. Jennings*, &c., 481.

FEMES COVERT—Continued.

7. As a general rule a *feme covert* cannot, according to the common law, contract as a *feme sole*, nor as such sue or be sued. Courts of equity acting upon this principle have held that a *feme covert* cannot bind herself personally, nor bind her separate estate by her general personal engagements. (2 *Roper*, *side page* 235; 10 *B. Mon.*, 320.) *Burch and Wife vs. Breckinridge*, &c., 486.
8. A *feme covert* may charge her separate estate whenever she thinks proper to do so. This intention must be manifest. It is not sufficient that she create debts; there must be an agreement express or implied to charge her separate estate. *Burch and Wife vs. Breckinridge*, 486.
9. The execution of a note or endorsement of a bill of exchange has been regarded as manifesting an intention by a *feme covert* to charge her separate estate. (7 *B. Mon.*, 293; 13 *Ib.*, 384.) *Burch and Wife vs. Breckinridge*, 487.
10. Land, the separate property of a *feme covert*, cannot be made liable to satisfy debts created by verbal contracts. She cannot alien by parol, nor can she charge it by parol contract; (2 *Atkins*, 379;) otherwise, in respect to her personal estate, where the charge will be limited by the intention to charge. *Burch and Wife vs. Breckinridge*, 487.
11. The trustee holding the title to the separate estate of the wife cannot charge the same with her debts—her consent is indispensable. *Burch and Wife vs. Breckinridge*, 488.
12. Neither the act of 1848, that of 1776, 1785, 1796, or 1831, relating to conveyances of land by *femes covert*, authorize the conclusion that a *feme covert* uniting with her husband in a conveyance of land in which there is a warranty of title, is bound with or as the surety of the husband in such warranty. The statutes only enable her to pass her title. *Falmouth Bridge Company vs. Tibbatts*, 637.
13. The living wife of a surviving partner has no vested interest in real estate, held as partnership stock. *Galbraith vs. Gedge*, &c., 635.

FERRIES.

See *Franchises*. See *Constitutional Law*.

FRANCHISES.

1. The right of holding a ferry, and its privilege of conveying passengers for toll, is a franchise in which the chancellor may protect the person in possession, not only by affording redress for the past, but to restrain its repeated disturbance; especially if the right has been judicially established. (9 *Johnson's Reports*, 585.) *Newport, &c. vs. Taylor's, Executor*, 779.
2. An executor, who by will was directed to lease out a ferry, could without uniting the heirs of the testator maintain a petition in equity to be quieted in the enjoyment of the franchise. *Newport &c. vs. Taylors, Executor*, 781.
3. The laws of Kentucky only profess to grant the privilege to ferry keepers, to convey passengers, &c., to the opposite side of the Ohio river; and the same power and right is accorded to Ohio State, and to land at any public landing or wharf, or on private property by leave to do so. *Newport, &c. vs. Taylor's Executor*, 784.

See *Common Carriers*. See *Ferries*.

FRAUD.

1. Where there has been a fraudulent sale made with the intent of securing to the vendor a future interest in the property, and the sale is for less than the value of the property, the chancellor will set aside such sale, and subject the property to the payment of debts due to judgment creditors. *Smead, Collard & Hughes vs. Williamson*, 536.

FRAUD—Continued.

2. Where the object of a suit in chancery is to restrain the fraudulent disposition of property, to avoid the payment of a legal liability which is inevitable, (as for inability to return a slave hired, arising from the act of the hirer,) the chancellor has jurisdiction to settle and adjust the whole controversy, and two persons having separate right to sue at law may unite in a petition in equity in such suit, for the benefit of one party. *Carney, &c. vs. Walden, &c.*, 397.
3. A provision in a deed of trust that the trustee shall "sell at fair and reasonable price," is not such a restriction on the power of the trustee to sell, as renders the deed fraudulent. *Ely, Clapp &c. vs. Hair, &c.*, 238.
4. Nor is a deed of trust that conveys all and every description of property belonging to the grantors, to be regarded as fraudulent because of the farther provision, that the property will be more particularly set forth in an inventory to be made out. *Ely, Clapp, &c., vs. Hair, &c.*, 239.
5. Nor is it fraudulent in a deed of trust that it provides, that after the payment of specified debts the surplus, if any, shall be paid to the grantors. This it would be the duty of the trustee to do, independently of any express provision in the deed to that effect. The interest of the grantor in a deed of trust is analogous to that of a mortgagor. *Ely, Clapp, &c. vs. Hair, &c.*, 240.

GAMING.

A sale of property to be paid for at its fair value, or at more than its fair value in a certain event of a pending election, and not to be paid for at all, or to be paid for at more or less than its real value as understood between the parties, in a different event of the same election, is in substance a bet upon the result of the election. *Commonwealth vs. Shouse*, 228.

HUSBAND AND WIFE.

1. To render a disposition made by the wife, of her property before marriage, fraudulent against the husband as against his marital rights, it must be made pending the treaty of marriage, and without his knowledge. *Cheshire and Wife vs. Payne, &c.* 627.
2. If the husband be apprised before the marriage of the disposition by the intended wife of her property, he cannot claim to have been defrauded by it. If, notwithstanding such knowledge, he consummate the marriage contract, he cannot afterwards complain, as such an act on the part of the intended wife, would be a valid defense for a refusal to consummate the marriage contract. (*Hobbs vs. Blanford*, 7 B. Monroe, 89, overruled.) *Cheshire and Wife as. Payne, &c.* 627.

See *Fences Covert*.

INDICTMENTS.

1. In an indictment under the first section of the seventeenth article of the Revised Statutes for shooting at another, (page 264) it is not necessary to aver that the shooting was done maliciously, and it was not error in the court to refuse an instruction to the jury, that to authorize a conviction, they should believe from the evidence that it was done with malice aforethought. *Robinson vs. Commonwealth*, 616.
2. The indictment charged a shooting with intent to kill and murder. The jury found the defendant guilty of shooting with the intent to kill or wound him; both of the offenses, being equally penal offenses, and the charge of intent to kill and murder being the higher offense, includes that of an intent to kill or wound. (*Criminal Code*, sec. 258 and sec. 259.) The Code makes all injuries by assaulting, but degrees of the same offense, and to assault with intent to wound is a degree of the offense of assaulting with the intent to kill. The finding of

INDICTMENTS—Continued.

- the jury was therefore good, and authorized a judgment. *Robinson vs. Commonwealth*, 617.
3. Where a person or thing necessary to be mentioned in an indictment is described with circumstances of greater particularity than is requisite, yet those circumstances must be proved, otherwise it would not appear that the person or thing is the same described in the indictment. (*Wharton's American Criminal Law*, 3d Ed. page 101; *Dorsett's case*, 5 *Roger's Rec.* 77; 6 *Maine* 476; *United States vs. Porter*, 3 *days cases*, 283.) *Clark vs. Commonwealth*, 213.
 4. The indictment was for having 'counterfeit bills in possession of a certain description, purporting to be on certain named banks with the intent to pass them. The proof failed to show that the notes which defendant had purported to be on any of the banks specified; such proof was necessary to authorize a conviction, and the court should so have instructed the jury when requested. *Clark vs. Commonwealth*, 213.
 5. It is not necessary that the intention should be to pass counterfeit bills in the State of Kentucky. The statute is general, embracing the intention to pass them at any place. *Clark vs. Commonwealth*, 213.

INSTRUCTIONS.

See *Indictments*. See *Practice in Circuit Court*.

INFANTS.

1. The circuit court has no jurisdiction to order the sale of infants' real estate, whether they be plaintiffs or defendants to a proceeding for that purpose, until commissioners make report under oath, to the court the net value of the infants' real and personal estate, and the annual profits. These provisions of the law must be strictly pursued. (*Revised Statutes*, chap. 6, art. 3, p. 592.) *Carpenter & Grigsby vs. Strother's heirs*, 296.
2. If defendant to such a proceeding be an infant, the guardian must file an answer, under oath, setting forth his belief that a sale will redound to the interest of his ward, before the court can decree a sale. A sale made without a compliance with these prerequisites is void. *Ib.*, 296.

INSURANCE.

1. Policies of insurance should be liberally construed, to effectuate the intention of the assured. *Etina Insurance Co. vs. Jackson & Co.*, and *Jackson & Co. vs. Etina Insurance Co.*, 250.
2. A policy insuring all the articles constituting the stock of a pork house, and all articles contained in the building, described and appurtenant thereto, covers all within those buildings, without regard to the particular ownership of each or any article which was at the risk of the insured. *Ib.*, 263.
3. When a stipulation in a policy of insurance is that the insurers are not to be liable for loss arising from the bursting of boilers, and the boiler burst, and the boat took fire and burned up: Held that there was no liability under the policy. *Montgomery, &c. vs. Fireman's Ins. Co.*, 442.
4. The fact that a steamboat navigating the western waters is placed in a situation, that in all reasonable probability a total loss would ensue unless a jettison take place of part of the goods, will not justify the jettison and excuse the carrier, unless the crisis come without fault, (i. e.) without due skill and diligence in overcoming the evil. A jettison will not be justified on account of probable injury to the boat, or a desire to expedite the trip; or if it occur from the insufficiency of the boat, or negligence or incapacity of those engaged in navigating it. *Bentley, &c. vs. Bustard*, 676.

INSURANCE—Continued.

5. To make available as a defense for a carrier of goods by steamboat, for a casting overboard the goods, and their total loss to the shipper, the defense must show that it resulted from the dangers of the river which could not have been avoided, and that the jettison was rendered necessary by circumstances over which the defendants and their agents and servants had no control, and which could not have been avoided by the exercise of that vigilance which was appropriate to their respective stations, and called for by the navigation on which they were engaged, and when there was no reasonable means of avoiding a total loss, but by sacrificing a part of the property at risk, for the safety of the residue. *Ib.*, 675.
6. Peril of life is not a necessary ingredient in the justification of a jettison of goods. *Ib.*, 679.
7. The same rules, without relaxation, which apply to a justification for a jettison at sea, where the perils of the sea are excepted, apply to a jettison on the Ohio and Mississippi, under the exception of the dangers of the river. *Ib.*, 681.
8. If an obstruction in the river be known, and a vessel run upon it, or upon the shore, without being driven by force of wind or current of the river, which could have been prevented by proper care and skill, a jettison will not be justifiable. By known obstructions is meant such as were known to navigators of the stream generally, or to the navigators of the particular boat, or discoverable by them by the exercise of reasonable vigilance. (See 4 *Yerger*, 57; 5 *Ib.*, 7; 7 *Ib.*, 340.) *Ib.*, 683.
9. The owner of a boat sued for jettison should be credited by loss arising from leakage, on account of defect in the vessels when received on board. *Ib.*, 696.

JETTISON.

See *Insurance*. See *Lien*. See *Principal and Agent*.

LANDLORD AND TENANT.

See *Lien*.

LIEN.

1. A vendor of goods not delivered, but to be paid for on delivery, has a lien on the property retained in possession for securing payment, and it is upon the presumption that the agreed price is the fair value, and cannot be enhanced by any fluctuation in the value. And if the goods be insured, the vendor is entitled to the insurance corresponding with interest insured. Any interest remaining in a vendor, who has made a contract of sale, remains protected under an existing insurance. (8 *Mass. Rep.*, 516; 5 *Pick.*, 76; 19 *Ib.*, 81; *Am. Lead. Cases, in note to the case in 8 Mass. Rep.*) *Ætna Insurance Company vs. Jackson, Owsley & Co., and Jackson, Owsley & Co. vs. Ætna Insurance Company*, 269.
2. The lien of the landlord upon property brought upon leased premises, is only upon the interest which the lessee has in the property, and by the 14th section of the statute (*Rev. Stat.*, page 441,) the exclusive lien of the landlord is confined to the produce of the premises, fixtures, household furniture, and to such other personal property as is acquired before the tenant takes possession. The 15th section of said act, secures to the landlord one year's rent against incumbrances, given upon personal property after it is upon the premises, whether the rent accrue before or after the creation of the lien, and which shall not have been due more than four months. These periods of one year and four months, have reference to the levy of the warrant. *Fisher vs. Kollerts*, 406.
3. The 14th and 15th sections of the act concerning landlord and tenants, are to be so construed as to harmonize, and the latter so qualified as to harmonize with

LIEN—Continued.

- the former; the species of property, therefore, which is described in the 15th section, is subject to the exclusive lien under the same limitations as to the time when the rent in arrears becomes due, as that described by the 14th section; and for like reasons, the 19th and 20th sections. *Fisher vs. Kollerts*, 406.
4. To secure the benefit of the lien law of Covington, in behalf of mechanics, materials-men, &c., the suit must be instituted within one year from the completion of the work, or furnishing materials. *Pryor vs. White*, 607.
 5. If the party, by contract, postpone the payment for the work or materials, or part thereof, beyond the period of one year, the lien is lost, so far as the payment cannot be demanded within the year. *Pryor vs. White*, 608.

LIMITATION.

1. The statute of limitation, of 1809, of seven years, is a protection to one holding under a Kentucky land warrant, who has been seven years in possession, before suit, unless the person claiming has labored under some of the disabilities mentioned in the statute. (*Ashbrook vs. Quarles' heirs, ante.*) *Clark vs. Jones*, 126.
2. One disability cannot be added to another as coverture to infancy, to save the rights of a party against the operation of the statute of limitations, of 1809. It is the duty of a party claiming the benefit of the saving in the statute of limitations, to show the facts giving that protection. *Clark vs. Jones*, 128.
3. The statute of 1809 protects the rights of all, where part of the persons to whom the title accrues are infants, until all are of full age. *Clark vs. Jones*, 130.
4. Seven years' possession, with title, is a protection, under the act of 1809, against an equitable, as well as a legal title holder. *Clark vs. Jones*, 130.

See *Practice in Circuit Court*.

See *Possession*.

NEW TRIAL.

See *Practice in Circuit Court*.

PARTNERS AND PARTNERSHIP.

1. After a partnership has been dissolved and notice thereof, one partner cannot bind his former copartner by any other instrument of writing which creates a new cause of action, even for the renewal of a partnership note, or the liquidation of a partnership account. *Merritt vs. Pollys, &c.*, 355.
2. But a note given by one of a firm, in the usual course of business, will be binding on the other members of the firm, unless the payee had notice of the dissolution. *Merritt vs. Pollys, &c.*, 356.
3. When partners hold real property as partnership stock, and it is liable in equity to the payment of the debts of the firm, the widows are not entitled to dower until the partnership debts are paid. *Galbraith vs. Gedge, &c.*, 634.
4. It is not every purchase of real estate made by purchasers with the means of the firm that gives the estate the character of personalty, but only when it is bought for the purposes of the partnership business. *Galbraith vs. Gedge, &c.*, 635.
5. One of the late firm who has executed a note for a debt of the late firm, which was probably barred by the statute of limitation, is an incompetent witness to charge another member of the firm in a suit upon the note. *Merritt vs. Pollys*, 357.
6. Real property held in the joint names of a firm as partnership stock is to be regarded at law as held and owned as tenants in common in the absence of any agreement or understanding to the contrary, and subject to be so treated; but in equity it should be regarded as held in trust as partnership property, and liable

PARTNER AND PARTNERSHIP—Continued.

to the claims of the partners upon each other, and the debts of the partnership.
Galbraith vs. Gedge, &c., 633.

See *Principal and Agent*.

PAROL CONTRACTS.

See *Contracts*.

PARTIES.

1. The owners of a steamboat, sued by the general appellation, are not parties to a suit unless designated by name, and served with notice, actually or constructively. *Kounts vs. Brown*, 585.
2. A surviving partner of a firm cannot convey real estate of the firm; the title descends to the heirs of the deceased partner, and they are necessary parties to any suit to pass the title. (*Story on Partnership*, sec. 94, page 141; *Am. Lead. Cases.*) *Galbraith vs. Gedge, &c.*, 635.

See *Practice in Circuit Court*.

PATENTS.

See *Surveys*.

POSSESSION.

1. Where one of several tenants in common aliens part of the land, the purchaser will not be disturbed in his possession if the other claimants can be satisfied as to their interest out of the remainder. *Aloss, &c. vs. Town of Henderson*, 165.
2. Where the possession of slaves was acquired from the father of the wife by the husband on loan before the passage of the act of 1846, and given to the wife after the passage of the said act, before the husband had five years possession, they were not liable for his debts. The possession after the gift was in right of the wife. *Wheeler, &c., vs. Jennings, &c.*, 480.
3. A possession of twenty years, under a junior patent, with five acres cleared, will bar an ejectment under the elder patent, where there is nothing to show that the entry under the junior patent was not intended to be co-extensive with the boundary of the survey. *Franklin Academy vs. Hall, &c.*, 473.
4. A possession under a junior patent, not within the interference, will not authorize a recovery in ejectment by the elder patentee. *Franklin Academy vs. Hall, &c.*, 473.

See *Limitation*.

PRACTICE IN CIRCUIT COURT.

1. An error in the date from which interest is to be computed in entering judgment on a note or bill of exchange, or allowing costs of protest, will not be cause for reversal, unless the circuit court has refused to correct it on motion. *Clark, &c., vs. Finnell, &c.*, 334.

See *Practice in Court of Appeals*.

2. An answer to an action on a bill of exchange, that the defendant does not admit a certain fact, and calls for proof or does not admit that he owes the debt sued for, is not a denial, nor sufficient under the Code to put in issue a fact of which the defendant might have knowledge or belief. It is not the denial of any allegation of fact, nor the statement of any matter constituting a defense. (*Code of Practice* see 125, 2 and 3 clauses,) and is therefore bad on demurer. *Clark, &c. vs. Finnell, &c.*, 335.
3. It is not a valid plea of set off to plead to a suit by the commissioners of the Kentucky Trust Company Bank, appointed to collect the debts, and pay the creditors *pro rata*, that the notes received of the company were under par, and defendants suffered a loss, without a tender back of the notes, and bringing them into court. *Clark, &c. vs. Finnell, &c.*, 337.

PRACTICE IN CIRCUIT COURT—Continued.

4. An entry of judgment against the defendants will be regarded as a judgment against such only as have been served with process or have appeared. *Clark, &c., vs. Finnell, &c.*, 334.
5. A suit was brought in the county of defendant's residence; process issued to that county, and an adjoining county, and served in the latter county, in time for judgment; but not in the county of defendant's residence in time for judgment: Held that it was error to render judgment upon the service in the foreign county. (*Code of Practice, chap. 5, secs. 107, 110.*) *Raymon vs. Reed*, 350.
6. The defendant having objected to the judgment, and the court overruling his objection, it was proper to bring the case up for correction of the judgment. But if the court had not decided the question in that form, it would have been necessary to have moved the court for its correction, as a clerical misprision, before bringing the case to this court. *Raymon vs. Reed*, 350.
7. In a suit by an assignor of a note, which the assignee has failed to recover from the obligor, it is necessary to set out the consideration of the assignment. *Elkott vs. Threlkeld*, 343.
8. The plaintiff should also state the reason why the amount was not recovered from the obligor. *Ib.*, 344.
9. The court should not give to the jury a positive instruction to find a particular fact, when there is testimony conducing to show the contrary. *Merritt vs. Pellys, &c.*, 356.
10. When the terms of the subscription are prescribed by a charter, it is not necessary to state the terms in the petition; and a general averment that all the terms and conditions necessary to authorize a demand of payment of subscriptions, is sufficient under the 149th section of the Code of Practice. *Henderson and Nashville R. R. Co. vs. Leavell*, 361.
11. To authorize a corporation, created by statute, to sue, it is not necessary that it should aver its regular organization; and generally one dealing with a corporation is not permitted to deny its existence. *Ib.*, 363.
12. It is not necessary to aver readiness to perform a part of a contract, which is to be performed after the act complained of. *Ib.*, 363.
13. A replication of the plea of the statute of limitations in an action of assumpsit, averring that the defendant assumed to pay in 1841, and immediately thereafter removed to Missouri, and there resided until 1847, and did not return to Kentucky except occasionally passing through it without plaintiff's knowledge, whereby plaintiff was obstructed from bringing his suit, presents a valid answer to the plea of the statute of limitations of 1796. *Ridgeley vs. Price*, 414.
14. A promise made after the consideration of the first promise has been advanced, in consideration of the indebtedness, may be averred and relied upon, and the limitation in such case will commence from the last promise; and if the plaintiff be obstructed in bringing his suit, by the removal of the party from the country, the effect of limitation will be suspended during such obstruction. *Ridgeley vs. Price*, 415.
15. A party cannot complain of an instruction to the jury, by which he could not have been prejudiced. *Ridgeley vs. Price*, 416.
16. Upon an answer by one defendant against another, being made a cross petition against defendant, process is necessary before decree. *Thomas vs. Thomas' Ex'or*, 426.
17. Where infants appear in court on their own petition, to be made parties, process

PRACTICE IN CIRCUIT COURTS—Continued.

- is not necessary; that the court appointed a guardian *ad litem*, to answer, was sufficient. *Burch and wife vs. Breckinridge*, 491.
18. To constitute a sufficient ground for a new trial, because of a juror having served on a jury in the same suit, and found a verdict against the party, it must appear that the fact was unknown to the party, when the juror was accepted, and until it was too late to make it known before the jury retired. It is the duty of the parties to look to the record of a former trial for such facts. *Fitzpatrick vs. Harris*, 563.
 19. A petition asking redress for an injury, arising from negligence or want of skill in the performance of a lawful act, should state such facts as would have authorized an action on the case. And a petition claiming redress for an injury done with force, such facts as would have authorized the action of trespass. *Kountz vs. Brown*, 584.
 20. Juries are authorized to give exemplary damages, in cases of wanton and reckless negligence, as well as for forcible injuries; and it is not error for the court in such cases so to instruct the jury. *Kountz vs. Brown*, 585.
 21. The court can only reverse a judgment in a criminal case, for errors apparent on the record. (*Crim. Code*, sec. 348.) *Robinson vs. Com'rs*, 618.
 22. Although a fact which might bar a recovery, ought, properly, to be negatived, in a petition on a covenant, and is not negatived; yet, if in the answer, it be set out and relied upon as a defense, it forms an issue in the case, and no reversal should take place for a failure to make the averment in the petition. *Bentley, &c. vs. Bustard*, 674.
 23. The answer to a petition to recover damages for a loss by the goods being cast overboard by the carrier, to be good must show all the facts necessary to justification of the jettison. The averment that the loss occurred by the dangers of the river is not sufficient; it is but a conclusion of law. *Bentley, &c., vs. Bustard*, 686.
 24. But if a justification be alledged in general terms, which embraces the particular facts necessary to be proved, and the parties go to trial upon that issue, and evidence offered conducing to show facts upon the finding of which to be true, the jury might have found for the defendants, and a verdict thereon would have been a bar to any future action; yet the defendants should not be prevented from questioning the decision of the court, on the ground of errors occurring during the progress of the trial, which may have produced a verdict against them. *Bentley, &c. vs. Bustard*, 690.

PRACTICE AT LAW.

1. Held that plaintiff was entitled to judgment against the defendants served with process, in the county where the suit was brought. (*Landedale vs. Mitchell*, 14 B Mon., 348.) *Nixon vs. Jack, &c.*, 179.
2. A jury is not authorized to infer a promise of marriage from visits, and such respects on the part of the male as are used in courtships, nor that a promise was made within a year before suit was brought, from the fact that such visits continued to a period within a year from that time, and it was error for the court so to say to the jury. *Burnham vs. Cornwall*, 288.
3. To instruct a jury that evidence of conversations between the witness and the party alone, uncorroborated by other proof or circumstances, "was the weakest testimony held competent by law," held to be improper, and a cause of reversal where there was other corroborating evidence and circumstances. *Western vs. Pollard*, 321.

PRACTICE AT LAW—Continued.

4. It is necessary in an indictment for betting on an election that a certain individual would, or would not be elected; to aver that the individual was a candidate, or was proposed or voted for for the office. *Commonwealth vs. Shouse*, 329.

See *Criminal Causes*.

PRACTICE IN CHANCERY.

1. The question whether two witnesses is necessary to overturn the statements of an answer under the Code, stated but not decided. *Nixon vs. Jack & Co.*, 181.
2. Petition in equity filed against Jack & Co., consisting of Jack, Goodall, Dean, & Haven, attaching a tract of land in Lewis county. Process served on Jack and Haven, the other defendants, non-residents, erroneously dismissed by the circuit court. *Id.*
3. It is not a ground for injunction a suit for a debt created by the loan of the notes, that defendants had parted with the notes, and were sued for their nominal value, and the suit still pending. The court could not rescind the contract without restoring the notes. *Clark, &c. vs. Finnell, &c.*, 337.
4. If a party, in his bill in chancery, fail to show that he is entitled to the specific relief which he asks, yet if he show any right to relief, even in a court of law, a demurrer to a bill should not be sustained as to the whole claim, but the case transferred to the common law docket. *Foster vs. Watson*, 387.

See *Practice in Circuit Court*.

PRACTICE IN COURT OF APPEALS.

1. If the record in cases of appeal from a judgment for misdemeanor, be not filed within sixty days after the judgment, the court of appeals cannot take jurisdiction of the case. *Commonwealth vs. Adams*, 339.
2. The court of appeals will, of their own mere motion, award a *certiorari* to the clerk of the inferior court, where there is a strong presumption, from the facts appearing in the record, that the clerk has copied a paper erroneously. *Franklin Academy vs. Hall, &c.*, 474.

See *Appeals*. See *Contract*.

PREEMPTION.

1. A settler upon land previously surveyed has no preemptive right. *Parker vs. Patrick*, 571.
2. The act of 1831 gave a preemptive right to actual settlers to any land which they had improved, or cultivated, or enclosed, and was in their actual possession, use or occupation. The subsequent act of 1835 gave no preemption to mere settlers on vacant land, without any claim or color of title, and vested all the vacant land in the county courts. By the act of 1839, to amend the act of 1831, a preemptive right is given to any actual settler, upon any vacant land, subject to the limitations and conditions of the laws then in force, to any number of acres not exceeding one hundred, to include the improvements, to be laid off in a square as near as may be. (3 *Stat. Law*, 388.) Two classes of settlers are recognized by the statutes, the one holding under color of title deed or bond for title—the other without color of title. *Id.*, 570.

PRINCIPAL AND AGENT.

1. The execution of a deed of trust by one member of a firm, with the assent of the other, is valid, and is a waiver of any lien, and partnership creditors can assert no lien which he could not assert. *Ely, Clapp, &c. vs. Hair, Nugent, & Co.* 237

PRINCIPAL AND AGENT—Continued.

2. An agent or consignee having the property of his principal in his possession, and responsible for it, may, and especially if he have an interest in it, though it be only for his commissions, insure it in his own name, and in case of loss recover its full value, holding all beyond his own interest, in trust for the owners of the property. (*Story on Agency*, section 111; *Hewitt Allison & Co. vs. Franklin Insurance Company*, 3 B. Monroe, 231; 1 Hall 189.) *Ætina Insurance Company vs. Jackson, Owsley & Co. and Jackson Owsley & Co. vs. Ætina Insurance Company*, 258.
3. At common law the principal was not liable for the willful trespass of his agent; but he was responsible for injuries from the carelessness, negligence or want of skill of the agent while in the performance of the business of the principal. *Kountz vs. Brown, &c.* 582.

See *Practice in Circuit Court*.

RAILROADS.

1. Subscribers for railroad stock will be presumed to know the provisions of the charter under which the subscription is made. *Wight vs. Shelby Railroad Co.*, 5.
2. Conditional subscriptions to a railroad, not inconsistent with the terms of a charter, are binding, if the conditions are performed. *Henderson and Nashville Railroad Company vs. Leavell*, 364.

See *Corporations*.

RENTS AND IMPROVEMENTS.

1. Land was purchased of the husband which was the inheritance of the wife, conveyed by a deed by husband and wife, to J. T., who afterwards conveyed to B; but the first deed was not so acknowledged as to pass the wife's right. It was sold to a sub-purchaser and improved by him. After the death of the husband, the wife sued for and recovered the land, which had been improved by the purchasers. Held, that for improvements by which the vendible value of the land was increased, the widow was in equity bound to account, deducting the value of the rents accruing from the death of the husband. (*Bell vs. Barlow*, 1 Marsh, 246.) The principle is laid down in *Bell vs. Barnett*, (2 J. J. Marsh., 516,) that one who acquires title to land *bona fide*, and enters upon and improves it, supposing it to be his own, is entitled to compensation for improvements. The second purchaser in this case was not presumed to have known the defect in the certificate of acknowledgment. *Thomas vs. Thomas' Ex'or*, 424.
2. The liability in such cases is to be measured by the increase in the vendible value of the land when recovered, arising from improvements. *Thomas vs. Thomas' Ex'or*, 425.

RUNAWAYS.

See *Slaves*.

SET OFF.

One who is a debtor to a bank, the funds of which are placed in the hands of commissioners for liquidation, may properly claim a set-off for anything due to him from the bank at the date of the assignment. (3 Dana, 398.) *Finnell, &c. vs. Nesbitt, &c.*, 354.)

See *Practice in Circuit Court*.

SHERIFFS' RETURNS.

See *Executions*.

SLAVES.

1. When a slave is brought before a justice of the peace as a runaway slave, it is the duty of the justice to determine whether or not he be a runaway, and wheth-

SLAVES—Continued.

er the person apprehending the slave shall deliver him to the owner or to the jailer of the county, (*Revised Statutes*, 636,) in connection with the act of 1811. *Bullitt vs. Clement*, 98.)

2. Though the warrant issued by the justice in such case may not conform literally to the requisitions of the statute if the omission be not material or prejudicial to the owner of the slave he cannot complain. *Bullitt vs. Clement*, 199.

See *Devises*.

3. A slave is incapable of holding property or receiving the title to property in any degree, and a devise of property to a slave is void, as is a devise to another for the benefit of a slave, and passes no title to the slave. *Taylor vs. Embry*, 340.
4. The devise to a slave being void, the property passes to heir-at-law; (1 *Stat. Law*, 596;) and such heir may sue and compel a release of title from one asserting right under such void devise. (*See Acts* 1853-4, page, 149.) *Taylor vs. Embry*, 340.
5. Though the hirer of a slave will not be responsible for the value of a slave which he has bound himself to return at the expiration of the term of hiring, when he is prevented from doing so by the act of God, the slave, or the owner, yet he is responsible when his inability to return the slave arises from his own illegal and wrongful act. *Carney, &c. vs. Walden, &c.*, 396.

SUBSCRIPTIONS.

See *Railroads*.

See *Corporations*.

SURVEYS.

1. The 10th section of the act of 1815, authorizing the issue of Kentucky land warrants, does not declare a patent issued on such warrants to be void, but only declares all titles founded upon surveys theretofore, which, by the laws at the time being were authorized to be made, shall be deemed superior to surveys made on the Kentucky land warrant obtained by virtue of said act, &c. *Clark vs. Jones*, 126.
2. By the act of 1815, a survey under a Kentucky land warrant is the commencement of the title. The filing of the warrant with the surveyor gives no right to any specific land until regular application to the surveyor for a survey thereof. *Parker vs. Patrick*, 569.
3. The survey, by the act of 1815, being the commencement of the title, it seems that the party is entitled to the land surveyed, whether it conform to the entry or not. *Ib.*, 572.

SURETIES.

1. B became the surety of H in a note drawn, payable to a bank, with the express view of obtaining a loan of money for the support of the family of H. H, without the assent of B, passed it off to R in discharge of a pre-existing debt: held that B was not responsible to R upon the note. *Russell vs. Ballard*, 205.
2. The liability of the surety and the principal is generally the same. When the principal is bound the surety is also bound. The wrongful act of the principal will not exonerate the surety. *Carney, &c. vs. Walden, &c.*, 396.

STEAMBOATS.

1. The owner of a slave domiciled in the State of Missouri, and having his slave there, cannot maintain a suit against a steamboat, for the value of a slave escaping on such boat, on the ground that the boat passed through waters of Kentucky with the slave on board, under the statute of Kentucky. (*Revised Statute*, 143-4. *Bracken vs. Boat Gulnare*, 453.

STEAMBOATS—Continued.

2. To render the boat liable under the statute, the slave must be conveyed out of this state, or from one part of the state to another, and this when the slave is taken on board of a vessel in this state, or at any place out of the state. *Bracken vs. Boat Gulnare*, 454.
3. The statute was not intended to embrace slaves who were in no way subject to our laws at the time of their escape. *Bracken vs. Boat Gulnare*, 455.
4. Since the adoption of the Revised Statutes, the owners of steamboats or other vessels, are liable as well as officers and crew; and an action for such injury can now be maintained against the owners as well as the commander, without any allegation of carelessness or unskillfulness. *Kounts vs. Brown*, 582.
5. The act of Congress of the 30th August, 1852, for appointing inspectors in certain districts, and authorizing them to license engineers and pilots, supercedes any state law upon the subject, and a license from such inspectors is a protection to the holder against any penalty denounced by a state law for neglecting to obtain a license under its authority; and a license to pilot boats on the Ohio river between two points embracing the falls of Ohio, authorizes the holder to pilot boats over the falls. *Dryden vs. Commonwealth*, 603.
6. A license under the act of Congress of 2nd March, 1837, from the Governor of Indiana, to pilot boats over the falls of Ohio, was a valid license. *Dryden vs. Commonwealth*, 604.

See *Insurance*. See *Ferries*.

TENANTS.

See *Lien*.

TIPPLING HOUSES.

1. In an indictment for keeping a tippling house, it is sufficient to aver that the defendant kept a tippling house, without averring that he had no license to retail spirits. (*Rev. Stat.*, 663.) *Commonwealth vs. Harvey*, 1.
2. Before the passage of the Revised Statutes such averment was necessary, when the object was to punish the defendant for keeping a tippling house under color of keeping a tavern, where the penalty was different. *Id.*

See *Indictments*.

See *Practice in Circuit Courts*.

TRUSTS.

1. A purchaser of land under a decree, made the purchase for about one third of the value of the land, and holding the land under a parol assurance to the debtor that he might redeem, sold the benefit of his purchase to a third person, who promised his vendor and the debtor to extend the privilege of redemption to the debtor. Held, that though the agreement was by parol, that the purchaser could not refuse to perform, and the debtor should be allowed to redeem. *Martin vs. Martin*, 8.
2. Any interest which a mortgagor or grantor has in a deed of trust can be subjected to his debts. *Ely, Clapp, &c. vs. Hair, &c.*, 241.
3. The act of 1796 subjecting trust estates to the payment of the debts of the *cestui qui trust* has no application to the separate estate of a *feme covert*. *Burch and Wife, &c. vs. Breckinridge, &c.*, 486.

See *Dower*.

See *Feme Covert*.

See *Husband and Wife*.

See *Fraud*.

VENDOR AND VENDEE.

See *Contracts*.

WILLS.

1. The 5th section of chapter 106 of the Revised Statutes, is, in substance, a re-enactment of the statute of 1797. (*Stat. Law*, 1537.) In regard to the attestation of wills, under which it was held, that the acknowledgment of the will by the testator, in the presence of the witnesses, though written and the testator's name subscribed, by another at a different time, was a sufficient publication. (*Shanks vs. Christopher*, 3 Mar., 144, and in *Cochran's Will case*, 3 Bibb, 491.) *Upchurch vs. Upchurch*, 112.
2. Though the statute demands that the witnesses shall subscribe the will with their names, in the presence of the testator, a literal compliance has not been exacted, either under our statute or that of 29 Charles II, under which it has been held that marksmen were sufficient, and where one witness was unable to read or write, another might write his name, and the witness attach his mark. (1 *Williams on Executors*, 79, 3d American Edition.) *Upchurch vs. Upchurch*, 112.
3. A testator devised "to Mary Baker Didlake and her children," a tract of land; at the time of the devise, the devisee, Mary, had no children; she afterwards had one child. Held, that Mary B. Didlake took an estate for life, and the child the remainder. *Carr and wife vs. Estill*, 313.
4. "I do hereby set free from bondage, the following negroes, purchased by me of J. C.: Negro woman Rose, on the 25th day of July, 1802, &c., also, the negro girl, Poll, which I purchased at Col. Chew's sale of negroes, who is aged about nine years and six months, on the 25th day of January, 1804." Held, that Poll was not free until the 25th day of January, 1814, and that her issue born before the last named day, were slaves. *Spurrier's heirs vs. Parker, &c.*, 279.

See *Descents*.See *Devisees*.

WITNESS.

See *Evidence*.See *Practice in Circuit Court*.

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